

TO
THE RIGHT HONOURABLE
WILLIAM PITT,
CHANCELLOR AND UNDER-TREASURER
OF HIS MAJESTY'S
COURT OF EXCHEQUER AT WRSTMINSTER;
THE RIGHT HONOURABLE
SIR ARCHIBALD MACDONALD, KNIGHT,
LORD CHIEF BARON;
THE HONOURABLE
SIR BEAUMONT HOTHAM, KNIGHT;
SIR RICHARD PERRY, KNIGHT;
AND
SIR ALEXANDER THOMSON, KNIGHT;
BARONS;
THE FOLLOWING TREATISE ON
THE PRACTICE OF THIS COURT,
UPON PROCEEDINGS IN EQUITY,
IS RESPECTFULLY INSCRIBED.

PREFACE

ALTHOUGH the Court of Exchequer has from the oldest times exercised an equitable jurisdiction, yet no regular or complete Treatise has appeared upon the practice of this branch of its jurisdiction.

The present work exhibits a general outline of all suits in equity; and in this respect it runs parallel with similar works that have already explained the practice of the Court of Chancery. But this work, even upon that ground, endeavours to be more instructive than the preceding publications upon the general practice of equity, by entering more fully and minutely into the detail of

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many very important branches of the operations of an equity court; and consequently in all those particulars this work may be equally useful to those who practice in either the Court of Exchequer, or in the Court of Chancery. The number and nature of these points, which are now exhibited for the first time in print, for the general instruction of suitors in either court, will plainly appear by comparing the Table of Contents prefixed to the body of this Treatise, with the contents of any of the preceding publications upon this subject.

But the peculiar course of practice in which the Court of Exchequer differs from the Court of Chancery, will also be found here, and only here; and these distinguishing circumstances are set forth upon the most authentic and indisputable authority, namely, that of the records
of

of the court itself, which have been purposely searched through in order to afford the most copious and satisfactory information upon all these matters. And this very difference of practice may be the more necessary to be known and attended to, as it may lead to improve the practice, either of the Court of Chancery or of the Exchequer, by inducing either of them to adopt that alternative of the points on which they differ, which may be most conducive to the advancement of justice.

It remains only to be noticed, that a great variety of forms and precedents is inserted throughout the work, as well for the convenience of solicitors and agents, to whom they may be useful in the conduct of causes, as also for the explanation of the practice itself; it being

of

universally admitted, that legal forms often give the strongest illustration of the very principles upon which the law of the court is founded.

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OF THE
COURT OF EXCHEQUER,
AS IT RELATES TO
PROCEEDINGS IN EQUITY.

*Of the Jurisdiction of the Court of Exchequer,
as a Court of Equity.*

THE Court of Exchequer at Westminster, with respect to its equitable jurisdiction, is a supreme, independent Court of Equity, possessing a concurrent jurisdiction with the Court of Chancery, in all matters which are the subject of relief, and discovery, in that court, either by English bill, or information exhibited in the name, or at the relation of his Majesty's Attorney-General.

VOL. I.

B

At

At what precise period the equitable jurisdiction of this court commenced, the general history of its, and its records are silent; but we are well warranted in supposing, that it had its commencement almost as early as the institution of the court itself, as a court of revenue. Upon this subject *Lord Coke*, in his *4th Institute*, cap. 13, thus expresses himself: "Some are of opinion that a court of equity was holden in the Exchequer chamber before the statute of the 33d H. 8. and then it must be a court of equity by prescription; for we find no former act of parliament that doth create and establish any such court; and if it be by prescription, then judicial presidents in course of equity must give the same." This is further evident from the stile in which its suitors have from the earliest times down to the present, continued to represent themselves by their bills or petitions to the court, as debtors, and accountants to the King; founding their claim to the administration of the equitable jurisdiction of the court, upon a fiction; that as debtors to his Majesty, they could not so well pay the debts they owed to the King, without having that relief which, as suitors, they prayed by their bill.

Under this peculiar jurisdiction it was formerly cause of demurrer in a plaintiff, if he omitted to state himself in his bill a debtor and accountant

to his Majesty, and this appears by the prescribed form of a demurrer referred to under the Title "Demurrer," and allowed by the court in cases, where this Suggestion was omitted in the Bill, but from the great extension of commerce, and other causes, founded in public convenience, this court now administers its justice, in matters of equity, to all his Majesty's subjects without distinction, under the form of this ancient fiction; in so much, that its equitable jurisdiction is no longer considered of a limited, but of a general nature; and if the suggestion alluded to in the bill was omitted, or the truth of it disputed, the court would not for such causes, entertain a demurrer, or suffer its general jurisdiction, as a court of equity, to be questioned.

To the general jurisdiction of this court in matters of equity, may be added a special jurisdiction conferred upon it by various statutes; such as the statutes of the 7 *Ann. ch. 19*, enabling infant trustees to convey, and the 29 *Geo. 2. ch. 31*, enabling infants, lunatics, and femes covert, to surrender leases in order to renew the same; besides various other statutes which might be referred to, that give the court a summary jurisdiction in particular cases; but in respect of tithes, this court, without assuming an exclusive jurisdiction, may yet be said to have acquired from early times a peculiar jurisdiction, by its nume-

rous decisions, upon this species of property; so that its decrees are now resorted to as of the highest legal authority.

In Mr. Hargrave's notes upon *Lord Coke's Instit.* vol. 3, lib. 2, title of Rents, sec. 234, note 290, in fo. 159, a, is the following note on Exchequer jurisdiction over tithes.

"Since Lord Coke's time a *third* remedy for tithes, where they are of small value, has been given; for by 7 & 8 W. 3, c. 6, tithes under 40s. may be recovered in a summary way, before two justices of the peace; and by 7 & 8 W. 3, c. 34, which was at first temporary, but is now made perpetual; tithes under ten pounds are made recoverable from *Quakers* in the same way. In London tithes, by the 37 H. 8, c. 12, are recoverable before the Lord Mayor, with an appeal to the Lord Chancellor. To these various modes of proceeding for tithes, should be added the equitable remedy by bill, either in Chancery or the Exchequer; both of which courts have long entertained suits for tithes. Formerly, however, the jurisdiction of Chancery in this respect was questioned, it being so far from settled in Lord Coke's time, that there are instances of controverting it even since the Restoration. 1 *Freem.* 303, 2 *Chanc. Cas.* 237. But as to the Exchequer, tithes are said

said to have been anciently cognizable there; though this is contradicted by Lord Chancellor Nottingham, who dates the origin of the proceeding by English Bill, and consequently that court's equitable jurisdiction over tithes from the statute of Henry 8, erecting the Court of Augmentation, *Hardr.* 236, 1 *Freem.* 303, and 33. *H. 8. c.* 39, this equitable interference of Chancery and the Exchequer with tithes, is generally considered as merely *incidental and collateral*; namely as a consequence of their jurisdiction in account and enforcing discovery. 3 *Blackst. Com.* 9 *Edw.* 437, and the reasons of the appellant in *Whitehead and others v. Travis and others. Dom. Proc. January, 1779.* But some give a broader foundation to this branch of Exchequer jurisdiction; and in respect of parochial tithes, which are part of the ancient inheritance of the Crown, they insist that suits for tithes must ever have fallen within the compass of the Exchequer's *direct and substantive* jurisdiction as a court of revenue. *See the case of respondent in the appeal before cited, and Hardr.* 117. Perhaps it is upon this idea, as well as on account of the greater frequency of suits for tithes in the Exchequer, that Lord Hardwick calls that court the proper jurisdiction for them. 3 *Atk.* 247."

Another reason may be added why the Court of Exchequer has had, and ought to have at all

times, the cognizance of tithe-suits, is the manifest ease, and convenience, of the suitors, whose rights so frequently depend for proof, upon the records of the court, deposited in its various offices, and particularly in the King's Remembrancer's Office, Treasurer's Remembrancer's Office, Augmentation Office, and Auditor's Office; these records being more familiarly known, and consequently more correctly understood, by the several persons in whose custody they are intrusted in each department, and who are competent at the same time to produce, and interpret them.

Of the Judges of the Court of Exchequer, as a Court of Equity.

ACCORDING to Lord Coke, the Court of Equity is before the Treasurer, Chancellor, and Barons. 4 *Inst.* 109.

The Lord Treasurer of England is the first officer of the Exchequer. 4 *Inst.* 104.

The Chancellor of the Exchequer has the custody of the seal of the Exchequer. 4 *Inst.* 104, 119. *Mad.* 580, and now has usually the office of Under Treasurer of the Exchequer. *Mad.* 578. He holds both offices by distinct patents.

During

Upon any unexpected vacancy of the office of Chancellor of the Exchequer, it has been customary to appoint the Chief Justice of England to hold it for a time. Upon the resignation of the Right Hon. Henry Bilson Legge, in the year 1737, Lord Mansfield, as Chief Justice of the Court of King's Bench, was appointed Chancellor by patent, dated the 13th of April in that year, and continued such until the re-appointment of Mr. Legge on the 2^d of June following.

The Lord Chief Baron, and other Barons of the Exchequer, are constituted by letters patent, *Mad.* 582. 4 *Inst.* 117, and were anciently barons and peers of the realm. 4 *Inst.* 103.

The office of Lord Treasurer is usually in commission; and, according to modern practice, all the orders and decrees of the court are made by the Chief Baron and Barons, without the assistance of the Chancellor, except only upon the first day of taking his seat. When the Chancellor takes his seat in court, the oaths of Allegiance, Supremacy, and Abjuration, and the declaration commonly called the Test, are first administered to him; and after he has signed the same, he opens the court by calling to the *Tubman*, who makes a motion of court, which being granted the Chancellor immediately retires. In case the Chief Baron and the other Barons are equally divided in

opinion, the Chancellor comes into court, and the cause is reheard before him and the Barons for their final decision.

This circumstance of the Barons being equally divided in opinion has happened in very few instances during the present century; where, to turn the scale of justice, the Chancellor was required to sit in judgment with the Barons, and the last was in the case of *Nash v. The East-India Company*, in Mich. Term 1735, when Sir Robert Walpole was Chancellor, whose decision upon a question of great doubt and difficulty, after a hearing of three days, is said to have given much satisfaction.

The Chancellor may take to his assistance the two Chief Justices, as was done in the *Attorney-General v. Sir Edward Farmer, Kt. and others*, 22d Nov. 29 Cha. 2.

The writs of the court are tested in the name of the Lord Chief Baron, and, during the vacancy of his office, in the name of the senior Baron, but are sealed with the seal of the Chancellor; which hath this peculiar convenience attending its public use, namely, that it is always open to the suitors of the court.

It should also be noted, that two of the senior barristers practising here are distinguished by seats and

and names peculiar to this court; namely, the *Postman*, and the *Tubman*, whose name has been already mentioned. The *Postman* is the senior counsel without the bar attending the court, and has pre-audience of the Attorney and Solicitor General in making the first motion upon the opening of the court. The *Tubman* is the next senior counsel without the bar. The *Postman* and *Tubman* have particular places assigned them by the Chief Baron in open court. It is only when the Chancellor takes his seat that the *Tubman* has pre-audience of the *Postman*.

*Of the Officers of the Court of Exchequer,
as a Court of Equity.*

THESE officers consist of the King's Remembrancer and his deputy or deputies, the first and second Secondaries, six Clerks, and four Examiners, who are all sworn officers of the court. To the secondaries and clerks are assigned twenty-four under clerks, or, as they are called, Side Clerks; which are classed in eight divisions; each secondary, and six clerk, having three side clerks in their respective divisions, who after having served *bona fide* a regular clerkship of five years in the office, are competent to practice for themselves in

in the name of a secondary, or six clerk, in whose division they are placed; and hence the six clerks become eligible by seniority, in a course of succession, to the office of a six clerk, as often as a vacancy happens, by death or resignation; but the appointment to such vacancy is discretionary in the King's Remembrancer.

To these sworn officers of the court, belong various branches of important duty, not necessary here to mention in detail, as all or most of them, which are incidental to the equitable jurisdiction of the court, will appear in the following work; but of these official duties it is sufficient to observe, that as they respect the remembrancer's deputy, secondaries and clerks, they comprehend all those which attach to the several distinct offices in the court of Chancery, such as the Six Clerks Office, Subpœna Office, Register's Office, Affidavit Office, Accountant-General's Office, and Report Office. The edifice in which these several duties (as they respect the Court of Exchequer) are all transacted by his Majesty's Remembrancer, his deputy and clerks, is now familiarly styled the Exchequer Office. In the reign of Charles the Second the business was removed (for the greater convenience of the practitioners) from Westminster Hall to its present situation in the Temple.

Oaths

Oaths of the Judges and Officers of the Court.

Oath of the Chancellor.

YE shall swere that ye shall serue well and
trewly the Kyng our souereygn lord in the
office of Chaunceler of this Eschequer and well and
trewley shall do all things that pertaineth unto
that office and ye shall speede the kynges befeignes
before all other and ye shall not enseale any writt of
iuggement of any other place than of this Eschequer
with the seall of this place whilles the Chauncerie
shall be xx myle about the place where this Es-
chequer is abyding. And also ye shall swere that if
it fortune you hereafter by reason of your office to
make any clerkes or ministres to occupie any office
of place within this corte ye shall make such
clerkes and ministres as ye will answere for at your
perill and such as shall be sufficeiaunt trewe and
lentendant unto that to them shall apperteigne in
speede as well of the Kyng's busignes as of his people
after the forme of the statute in that behalve made
in the parliament holden at Westminster the se-
cundeyere of the reigne of Kyng Henrie the 6th.

Soc help you God.

The

Oath of the Under Treasurer of the Exchequer.

YE shall wele and truely serue the Kyng our
 foueraign lord in the roome of Under Treas-
 ourer of this his Estchequer and in the receipt of
 the same and wele and truely survey and order as
 well the receipts of all sumes of money payed and
 to be payed to the Kyng's use in the seid receipt
 as thisflue of the same and wele and truely behave
 yorself in the same roome:

Soe help you God.

Oath of the Barons.

YE shall swere that wele and truely ye shall
 serue the Kyng oure fouereyne lord in the
 office of Baronn of this Eschequer and lawfully
 ye shall charge and discharge the peple that have
 to accompt affor you and right ye shall doo to all
 peple aswell to poure as to riche. And that for
 hygnes for ryches neyther for hate ne for thastate
 of any person that may be made to you or shal
 be made unto you ne by art or engyne the right
 of the Kyng nor of noon other ye shall not
 distourbe ne respite contrary to the lawes of the
 land. And the Kyngs detts ye shall not putt in
 respite

respice there where thaye maye goodely be levyed. And the Kyngs besynes ye shall spede affore all other. And that for gift wages nor benefit ye shall not concele the Kyngs profit and avantage in avantage of other nor of yourself. And that you shall not take fee nother robe of any person but of the Kyng only. And ye shall nothing take of any person for to doo wronge or delaye the right or for delyuery or delaye the peple that have to doo affore you but in all that you maye ye shall deliuer them. And there where ye maye understand wronge or prejudice be don to the Kyng ye shall put all your power and dylygence to redresse yt. And if ye maye not ye shall tell yt to the Kyng, or to those of his counsell whiche maye shewe yt to the Kyng, if ye maye nott come unto hym. And the Kyng's counsell ye shall kepe in all thyngs.

Soe help you God.

Oath of the King's Remembrancer.

YE shall sweare that ye shall wele and truly surue the Kyng our Souereygn Lord in the Office of the Remembrauncer of his Majestie of this his Elichequyer and the same office with all the

the rolls records and other mynuments nowe
 beyng and remaynyng in the same and that here-
 after shall be committed to your custodie and
 pertynyng to the same office ye shall safely and
 surely kepe or doo to be kepte to thuse of our
 feid sovereygn lord the KYng and of his heyres
 kynges of England. Ye shall true entre make
 of all awards and other thyngs to be entred in the
 feid office and that wyth all convenient speede
 Ye shall nott take of any person or persons by
 promyse guyfe reward or otherwise wherby the
 Kyng's Majestie may lese or be hyndered or by
 the whyche the right may be lett to any manner
 of person or persons And all other thyngs be-
 longyng to the Mayster of the feid office to doo
 ye shall well and truly doo wythout fraude or
 guyle.

Soe help you God.

The Oath of the Deputy Remembrancer is the
 same as that of the Remembrancer.

Oath of the Clerks.

YOU shall truly and diligently behave your-
 self as a Clerke in this office under the
 master of the same for the time being in all that
 to you as a clerke in the same office doth apper-
 taine.

taine. Yee shall not raze or imbezell ne assent or consent to the razing or imbezilling of any process or record of this court nor of any writt or retorne of any writt ne of any mandement or precept to this court directed or to be directed to the prejudice of the King or any other person and if ye shall hereafter know any thing done or imagined to the hurt of the master of this said office for the time being ye shall doe him thereof to weet with all speed convenient and occupy yourself for the furtherance of the busines concerning this office according to such knowledge and power as God shall give.

Soe help you God.

Oath of the Examiners.

YOU shall sweare that according to your skill and knowledge you shall well and truly sett downe in writeing all such examinations and depositions of witnesses as shall be taken before your baron your master duringe soe long tyme as you shall be by him deputed and appoynted as his clerke in that place as well depositions between the King and subject as between parties and partie and you shall diligently attend your said place and shall

duely

duely and truly performe and doe the buisnesse of
 a clerk examiner under your master to your best
 skill and knowledge soe long as you shall be by
 him imployed therein. You shall not publish or shew
 to any person any deposition or depositions taken
 or to be taken before your master between partie and
 partie before publication granted in court. You
 shall safely keepe all depositions of such persons as
 shall be sworne before your master and written by
 you to the end the same may be put into such place
 in court as by the court shall be appoynted for the
 safe keeping thereof.

Soe help you God.

OF THE
PRACTICE
OF THE
COURT OF EXCHEQUER,
IN EQUITY.

Of Parties to a Suit.

ALL bodies, politic and corporate, Who may exhibit bills. and all persons of full age, not being *femes covert*, *idiots*, or *lunatics*, are by *themselves capable* of exhibiting a bill of complaint in this court, excepting only the King and Queen. The Queen consort may sue alone, so may a Queen dowager, though married. 2 *Inst.* 50. *Co. Lit.* 133. Suits which respect the rights of the crown, or of those for whom it is a trustee, are carried on in

the name of the King's Attorney or Solicitor General, by an English information.

What are the disabilities.

The disabilities arising from outlawry, excommunication, conviction of popish recusancy, attainder, and alienage, do not absolutely disable the person suffering under them from exhibiting a bill. Outlawry, excommunication, and conviction of popish recusancy, are not in some cases any disability; and where they are a disability, if it be removed by reversal of the outlawry, by purchase of letters of absolution, in the case of excommunication, or by conformity, in the case of a popish recusant, a bill exhibited under the disability may be proceeded upon. Attainder and alienage no otherwise disable a person to sue, than as they deprive him of the property which is the object of the suit. Villenage and profession were in the same predicament. *Mitford on Plead.* 24.

Who are incapable of instituting a suit by themselves.

The persons incapable by themselves of instituting a suit are, *infants, feme covert, idiots, and lunatics.*

Where

Where a man prefers a bill to establish a *modus* against the lessee of the impropriation, he must make the owner of the impropriation a party; for this court will not bind the inheritance of any person unless he is before the court. *Glanvie v. Trelawney. Bunb. 70.*

Impropriator must be a party to a bill brought against his lessee to establish a *modus*.

Bill by plaintiffs, as lessees of the rector of *Winterbourn*, for a portion of great and small tithes in *Stoke Gifford*, being a neighbouring parish, the tenants, and the lay-impropriator, who claimed the great tithes in *Stoke Gifford*, were made parties; but because the vicar of *Stoke Gifford*, who might be intitled to the small tithes, was not made a party, the bill was ordered to be dismissed; but upon application stood over with liberty to amend. *Baily v. Worral. Bunb. 115.*

Bill for a portion of tithes in a neighbouring parish; the vicar of that parish must be a party.

Bill for tithes, by the bishop and sequestrator, during the incapacity of the incumbent, dismissed for want of making the incumbent a party. *The Bishop of London and Beaumont v. Nicholls. Bunb. 141.*

Bill for tithes by the bishop and sequestrator, the incumbent must be a party.

Bill to establish
a custom, the
owner of the
inheritance
must be a party.

Bill to establish a custom whereby the owners and occupiers of certain lands, in the parish of *Tort Baldwin*, in the county of *Oxford*, were obliged to keep a bull and boar for the use of the parishioners: it was objected at the hearing, that a custom which binds the inheritance of the lands can never be established in a court of equity without the owners of the inheritance are made parties, as *Queen's Coll.* (who were owners, &c.) ought to have been here; upon which objection the bill was dismissed *per totam curiam*. *Spendler v. Potter.* *Bunb.* 181.

Bill against a sequestrator, during the vacancy of a church, whether the Bishop ought not to be a party.

Bill by the vicar of *West Dean*, in the county of *Sussex*, against the defendant, who was sequestrator, for an account of the profits received during the vacation: it was objected for the defendant that the Bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives by the *Stat.* 28 H. 8.—The court seemed to think the Bishop should have been a party, but by consent this cause was referred to the Bishop of the diocese. *Jones v. Barrett.* *Bunb.* 192.

In

In the same case it was said, by a note of the reporter, that a sequestrator could not bring a bill alone for tithes, as was resolved in the case of *Berwick v. Swanton*, Trin. 1692, because he is a bailiff, and accountable to the Bishop, and has no interest.

In the case of *Makepeace and others v. Needler and others*, and the Attorney-General, Bunb. 291, bill charged that plaintiff was bound for one *Clarke* (who was door-keeper and accountant of the imprest money to the commissioners of excise), for his justly accounting, and faithful performance of his duty, during the time he continued in his office, which was from Nov. 1727 to June 1730, in which time *Clarke* had received a considerable sum, but had paid more than he had received by 161*l.* and so it would appear by his books of account, which he delivered up on going out of office to the defendants, who were accountants to the commissioners of excise. A *scire facias* issued against the plaintiff upon his bond, and thereupon he preferred his bill against the defendants and the Attorney-General for an injunction

Bill dismissed on demurrer, for want of making the commissioners of Excise parties.

to stay proceedings thereon, and for an inspection of books, &c.—The defendant demurred to the whole bill, because the commissioners of Excise were not made parties. Upon argument it was insisted for the plaintiff, that there was no necessity for such parties, the Attorney-General being a party, and having a superintendancy of the whole revenue, he stood in the place, and could litigate the account without them; but the demurrer was allowed.

The

*The several Kinds and Distinctions of
Bills.*

I. **O**RIGINAL bills, which relate to General classes.
some matters not before litigated Original bills.
in the court by the same persons, stand-
ing in the same interests.

II. Bills not original, which are either Not original.
an addition to, or a continuance of, an
original bill, or both.

III. Bills not original, which, though In the nature of
original bills,
though occa-
sioned by for-
mer bills.
occasioned by, or seeking the benefit of,
a former bill, are not a continuance
thereof, and are therefore in the nature
of original bills.

I. Original bills may be divided into Particular spe-
cies of each
class.
bills praying relief, and bills not pray-
ing relief. An original bill, praying Original bills,
and their
species.
relief, may be,

1. A bill praying the decree of the
court, touching some right claimed by
the person exhibiting the bill, in oppo-

Bill not origi-
nal, and then
species

sition to some right claimed by the per-
son against whom the bill is exhibited;
and to this head belongs the bill *quia
timet*.

of interpleader.

2. A bill of interpleader, where the
person exhibiting the bill claims no right,
in opposition to the rights claimed by the
persons against whom the bill is exhibited,
but prays the decree of the court, touch-
ing the rights of those persons, for the
safety of the person exhibiting the bill.

Certiorari.

3. A bill praying the writ of *certiorari*
to remove a cause from an inferior court
of equity.

An original bill, not praying relief,
may be,

To perpetuate
testimony.

1. A bill to perpetuate the testimony
of witnesses.

For discovery.

2. A bill for the discovery of facts
resting within the knowledge of the per-
son against whom the bill is exhibited,
or of deeds, writings, or other things,
in his custody or power.

II. A bill

H. A bill not considered as an original bill, but merely as an addition to, or a continuance of, the former bill, or both, may be,

Bills not original, and their species.

1. A supplemental bill, which is merely an addition to the original bill.

Supplemental.

2. A bill of revivor, which is a continuance of the original bill, when, by death, some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has, by marriage, incapacitated herself from suing alone.

Bill of revivor.

3. A bill, both of revivor and supplement, which continues a suit upon an abatement, and supplies defects arisen from some event subsequent to the institution of the suit.

Bill of revivor and supplement.

III. A bill in the nature of an original bill, though occasioned by, or seeking the benefit of, a former bill, may be,

Bills in the nature of original bills, and their species.

1. A cross bill, exhibited by the defendant in a former bill against the plaintiff in the same bill, touching some matter in litigation in the first bill.

Cross bill.

2. A bill

Bill of review.

2. A bill of review, to examine and reverse a decree made upon a former bill, and signed and inrolled, whereby it becomes a record of the court.

In nature of bills of review.

3. A bill, in the nature of a bill of review, brought by a person not bound by a former decree.

To impeach decrees for fraud, or to suspend or avoid their execution.

4. A bill to impeach a decree upon the ground of fraud, or to suspend or to avoid its execution on special circumstances.

To carry a decree into execution.

5. A bill to carry a decree made in a former suit into execution.

In nature of bills of revivor.

6. A bill in the nature of a bill of revivor, to obtain the benefit of a suit, after abatement in certain cases, which do not admit of a continuance of the original bill.

In nature of supplemental bills.

7. A bill in the nature of a supplemental bill, to obtain the benefit of a suit, either after abatement in other cases which do not admit of a continuance of the original bill, or after the suit is become defective, without abatement, in cases

cases which do not admit of a supplemental bill to supply that defect.

8. A bill filed by the direction of the court, for the purpose of obtaining its decree, touching some matter not put in issue by a former bill, or not in issue between the proper parties, but which must necessarily be determined, to enable the court to make a complete decree, touching the matters in litigation upon the first bill, *Mitford on Plead.*

Bills filed by the direction of the court.

Of the Matter and Form of Original Bills

Of original bills.

AS the bill must be sufficient in substance, so it must have convenient form. The form of an original bill commonly used consists of nine parts.

The address.

1. The address of the bill, which varies according to the names of those who hold the offices of Chancellor and Under Treasurer, and Chief Baron of the court; the present stile of which is, "To the Right Hon. *William Pitt*, Chancellor and Under Treasurer of his Majesty's court of Exchequer at Westminster. The Right Hon. Sir *Archibald Macdonald*, Kt. Lord Chief Baron of the same court, and to the rest of the Barons there."

Names of parties.

2. The names of the parties, complainants, and their descriptions, in which their abode is particularly required to be set forth, that the court and the parties, defendants to the bill, may know where

to

to resort to compel obedience to any order or process of the court, and particularly for payment of any costs which may be awarded against the plaintiff, or to punish any improper conduct in the course of the suit; and after this description of the parties, they must stile themselves, in conformity to the antient practice of the court, "Debtors and accountants to his Majesty, as by the records of this honourable court, and otherwise, it doth and may appear."

3. The third part contains the case of the plaintiffs, and is commonly called the stating part of the bill.

Cause of the plaintiff.

4. The general charge of confederacy against the persons complained of, which is commonly inserted, though it seems unnecessary.

Charge of confederacy.

5. If the plaintiffs are aware of a defence which may be made, and have any matter to alledge which may avoid it, the general charge of confederacy is usually followed by an allegation, that the defendants pretend or set up the matter of their defence, and by a charge of the matter

Of pretences set up by the defendant.

matter which may be used to avoid it. This is commonly called the charging part of the bill, and is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiffs to admit; for which purpose the charge of pretence of the defendant is held to be sufficient. Thus if a bill is filed on any equitable ground by an heir, who apprehends his ancestor has made a will, he may state his title as heir, and alledging the will, by way of pretence of the defendant's claiming under it, make it a part of the case without admitting it.

That his acts
are contrary to
equity.

6. The sixth part of the bill is intended to give jurisdiction of the suit to the court, by a general averment, that the acts complained of are contrary to equity, and tend to the injury of the complainants; and that they have no remedy, or not a complete remedy, without the assistance of the court; but this averment must be supported by the case shewn in the bill, from which it must be apparent that the court has jurisdiction.

7. The

7. The bill having shewn the plaintiff's title to relief, and that the court has the proper jurisdiction for that purpose, in the seventh place prays, that the parties complained of may answer all the matters contained in the former part of the bill, not only according to their positive knowledge of the facts stated, but also, according to their remembrance, to the information they may have received, and the belief they are enabled to form on the subject. A principal end of an answer upon the oath of the defendants is, to supply proof of the matters necessary to support the case of the plaintiffs; and it is therefore required of the defendants, either to admit or deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it; and also to declare themselves unable to form any belief concerning it. But as experience has proved, that the substance of the matters stated and charged in a bill may frequently be evaded, by answering, according to the letter only, it has become a practice to add, to the general requisition, that the defendants should answer the

And that he may answer the matters complained of.

the contents of the bill, a repetition by way of interrogatory of the matters most essential to be answered, adding to the enquiry after each fact, an enquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and compel a full answer. This is commonly termed the interrogating part of the bill; and as it was originally used only to compel a full answer to the matters contained in the former part of the bill, it must be founded on those matters; therefore, if there is nothing in the prior part of the bill to warrant an interrogatory, the defendant is not compellable to answer it—a practice necessary for the preservation of form and order in the pleadings, and particularly to keep the answer to the matters put in issue by the bill. But a variety of questions may be founded on a single charge, if they are relevant to it. Thus if a bill is filed against an executor, for an account of the personal estate of his testator, upon the single charge that he has proved the will, may be founded every enquiry which may be necessary to ascertain the amount
of

of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required.

8. The prayer of relief is the next Prayer of relief. and eighth part of the bill, and is varied according to the case made, concluding always with a prayer of general relief at the discretion of the court.

9. To attain all the ends of the bill, Prayer of process. it ninthly and lastly prays, that process may issue requiring the defendants to appear to and answer the bill, and abide the determination of the court on the subject; adding, in case any defendant has privilege of peerage, or is a lord of parliament, a prayer for a letter missive before the prayer of process; and in case the Attorney-General, as an officer of the crown, is made a defendant, the bill, instead of praying process against him, prays that he may answer it upon being attended with a copy. For the purpose of preserving property in dispute, pending a suit, or to prevent evasion of justice, the court either makes a special

order on the subject, or issues a provisional writ, as the writ of injunction, to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing any injurious act; the writ of *ne exeat regno*, to restrain the defendant from avoiding the plaintiff's demands, by quitting the kingdom, and other writs of a similar nature. When a bill seeks to obtain the special order of the court, or a provisional writ for any of these purposes, it is usual to insert in it, immediately before the prayer of process, a prayer for the order or particular writ which the case requires; and the bill is then commonly named, from the writ so prayed, an injunction bill, or a bill for a writ of *ne exeat regno*. These are the formal parts of an original bill as usually framed. *Mitford on Plead.* 41.

The conclusion
to an original
bill.

The conclusion consists of those words of course which pray process of *letter missive, subpoena, injunction*, &c. and is in the following form:

May it please your honours to grant
unto your orator, *not only his Majesty's*
most

most gracious writ of injunction, issuing out, and under the seal, of this honourable court, to be directed to the said

*to restrain him from proceeding at law against your orator, touching any of the matters in question, but also his Majesty's most gracious writ or writs of *subpæna*, to be directed to the said*

and to the rest of the confederates when discovered, thereby commanding them, and every of them, at a certain day, and under a certain pain therein to be limited, personally to be and appear before your honours in this honourable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and further, to stand, to perform, and abide, such further order, direction, and decree therein, as to your honours shall seem meet. And your orator shall ever pray, &c.

The proper prayer for an injunction depends upon the nature of the writ prayed by the bill; whether it be to stay proceedings at the common law, in the spiritual court, or court of admiralty, or

to stay waste committed, or threatened to be committed.

Prayer of process to a peer.

If the defendant be intitled to the privilege of peerage, or be a lord of parliament, a letter missive must be prayed in these words, immediately preceding the process of *subpæna*, To grant unto your orator the letter missive of your honours, to be directed to the said Earl of desiring him to appear to and

By letter missive.

Or in default by a *subpæna*.

answer your orator's said bill, or in default thereof his Majesty's most gracious writ or writs of *subpæna*, &c.

Conclusion to a bill praying a special order in the nature of a writ of *ne exeat regno*.

May it please your honours, the premises considered, to grant unto your orator, not only an order, in the nature of a writ of *ne exeat regno*, to restrain the said defendant from departing out of the jurisdiction of this court, but also his Majesty's most gracious writ or writs of *subpæna*, &c.

Bill must be signed by counsel.

The paper draft of every bill must be under counsel's hand; if it be not, or the hand be counterfeited, the bill will be dismissed on demurrer.

If

If the bill contains matter criminal, impertinent, or scandalous, such matter will be expunged with costs, upon an order of reference to the Deputy Remembrancer.

If it contains matter criminal, impertinent, or scandalous, it will be expunged with costs.

Scandal may be taken advantage of at any time, impertinence not; if reported scandalous it must be impertinent of course; but it may be impertinent without being scandalous. Charges in a bill referred for scandal and impertinence may be relevant to the merits, and the *majus* or *minus* of the relevancy is not material, for if relevant it cannot be said they are scandalous or impertinent; otherwise it would be laying down a rule, that all charges of fraud are scandalous, which would be dangerous; for nothing pertinent in the cause can be scandalous.

Scandal may be taken advantage of at any time, impertinence not.

2 Vez. 24. *Fenboulet v. Passavent.*

Of Bills Quia Timet.

Bills quia timet
what, and in
what cases
proper.

WHERE a person is intitled to any thing after a certain period of time, which for that interval is to be used by another, and may be wasted or destroyed; or where a person is intitled to a thing after the death of another, who is to have the use of the same during life; or where one may be injured by another neglecting or refusing to do what in equity and good conscience he is bound to do; in such cases a bill *quia timet* is proper, and the plaintiff may be relieved according to the nature and circumstances of his case; and the relief in these cases is founded upon this maxim, namely—that equity prevents mischief.

A. had the use of goods and a library for life, remainder to the plaintiff's wife, who was dead; but he, as her administrator, brought his bill to have the goods, &c. secured to him after the death of *A.* which was decreed accordingly. 1 *Ch. Rep.* 110.

If

If *A.* being seized of lands in fee, grants a rent-charge issuing thereout, and after devises the lands to *B.* for life, the remainder to *C.* in fee, and dies, *C.* may compel *B.* to pay the arrears, for fear all should fall on *C.* in reversion, although it was urged that this was a remote possibility. *Chan. Ca.* 223.

If *A.* is bound for *B.* and has a counter-bond from *B.* and the money is become payable on the original bond, equity will compel *B.* to pay the debt, though *A.* is not sued; for it is unreasonable that a man should always have such a cloud hang over him. *Per North, Lord K. Vern.* 190.

Of Bills of Interpleader.

Bill of interpleader what, and by whom it may be exhibited.

WHERE two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. In this bill he must state his own rights, and their several claims; and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and that he may be indemnified. If any suits at law are brought against him, he may also pray that the claimants may be restrained from proceeding till the right is determined. *Prac. Reg.* 38. *Mitf. on Plead.* 47.

In what cases filed.

A bill of interpleader is sometimes necessary where one, who is not party in the first suit, supposes he has a separate interest in the matter in question, commences his suit against the first defendant,

fendant, praying to be relieved according to his right; whereupon the first plaintiff makes the second a defendant, in order to interplead and contest the right; or if the first plaintiff does not make him a defendant, then if the defendant exhibits his bill, as he may do, against both plaintiffs, and pray that they may interplead, and try to which the thing in demand belongs, and further as his case requires: or if there be no suit here between the claimants, he who has suits at law brought against him, or is in danger of litigation from both the claimants, may file his bill against them, and pray that they may interplead, and that proceedings at law may be stayed till the right be determined. *Prac. Reg.* 39.

In a bill of interpleader, the plaintiff must annex an affidavit thereto, that he does not exhibit his bill by fraud or collusion with all or any of the parties, or with any other person or persons whomsoever, touching any of the matters in question in the cause, but only to be indemnified, and to pay his debt or rent to such person as the court shall direct.

Affidavit to be annexed that there is no fraud.

The

Affidavit need not swear it is at plaintiff's own expence, but only that there is no collusion.

The affidavit need not swear it is at the plaintiff's own expence, but only that there is no collusion with any of the defendants. *Metcalf v. Harvey.* 1 *Vez.* 248.

Form of the affidavit.

In the Exchequer.

Between *A. B.* plaintiff,

and

C. D. and *E. F.* defendants.

The above-named *A. B.* the plaintiff in this cause, maketh oath and faith, that the bill of complaint hereto annexed is not exhibited by the consent, knowledge, or collusion, of either of the defendants in the said bill named, but merely of his own free will, for relief in this honourable court.

A. B.

Sworn, &c.

If brought against the Attorney-General and others there must be an affidavit.

If a bill of interpleader is brought against the Attorney-General and others, there must be an affidavit annexed to the bill. *Errington v. The Attorney-General and others.* *Bunb.* 303.

If

If a cause has been heard upon a bill of interpleader, and a trial at law directed to settle the right between the defendants, there is an end of the suit as to the plaintiff, so that if he afterwards dies the cause shall still proceed; and there needs no revivor, each defendant being in the nature of a plaintiff ruled upon motion. 1 Vern. 351.

Cause heard upon bill of interpleader, and a trial at law directed to settle the right between the defendants, there is an end of the suit as to the plaintiff.

A bill of interpleader must shew there is such a person *in rerum natura* as can interplead. *Metcalf v. Harvey.* 1 Vez. 248.

Bill of interpleader must shew the right of the person to interplead.

And therefore an executor, as he is in *auter droit*, unless he has proved his testator's will, is not intitled to bring a bill of interpleader, as standing in the place of the testator, till by virtue of the probate he has made himself a debtor. *Mitchel v. Smart.* 3 Atk. 606.

An executor cannot exhibit his bill till he has proved the will of his testator.

A bill of interpleader cannot pray an injunction to restrain proceedings in ejectment, because such bill cannot be as to the possession, but must be as to the payment of some demand in money. 1 Vez. 248.

Bill of interpleader cannot pray an injunction to restrain proceedings in ejectment; but may for payment of money.

Of

Of *Certiorari* Bills.

Certiorari bill,
what.

WHEN an equitable right is sued for in an inferior court of equity, and by means of the limited jurisdiction of the court the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court, the defendant may file a bill in this court, praying a special writ of *certiorari* to remove the cause into this court. ² *Chan. Rep.* 109, 110. *Mist. on Plead.* 49.

How framed.

This bill must state the proceedings which have been had in the inferior court, the incompetency of that court, and prays the writ of *certiorari*. It does not pray that the defendant may answer, or even appear to the bill, and consequently the writ of *subpoena* is not prayed. *Ibid.*

Form of the
bill.

To the Right Hon. William
Pitt, Chancellor and Under Trea-
surer of his Majesty's court of
Exchequer at Westminster; the
Right

Right Hon. Sir *Archibald Macdonald*, Kt. Lord Chief Baron of the same court; and to the rest of the Barons there.

Humbly complaining, sheweth, &c. your orator *A. B.* &c. That whereas, &c. (*Setting forth the cause, and the state of its proceedings in the Lord Mayor's court*). All which said premises your orator hopes he shall make fully appear to your honours by several witnesses, if need be, which he could not produce within the said city of London, before the said Lord Mayor and his brethren, the Aldermen of the said city of London:

And your orator further sheweth unto your honours, that one *E. F.* a material witness for your said orator, concerning the said premises, at the time of the cause, &c. then lived and resided, and still liveth and resideth, at *Westminster*, without the jurisdiction of the said Lord Mayor and his brethren, the Aldermen of the said city of London, whereby your orator had no remedy to compel the said *E. F.* to be examined, or to give his testimony in the said cause, in the said city of London, concerning the

pre-

premises: *In tender consideration whereof*, and forasmuch as for want of jurisdiction in the said Lord Mayor and his brethren, the Aldermen of the said city of London, over your orator's witnesses, your orator is remediless there: And it being agreeable to the rules and practice of this honourable court, upon such necessities and defects of jurisdiction in inferior courts, for this honourable court to remove the records and proceedings thereof into this honourable court, and to proceed in this court upon the same, and all other matters and things incident thereto, or whereupon your orator seeks relief. May it please your honours therefore to grant unto your orator a writ of *certiorari*, to be directed to the said Lord Mayor of the city of London and his brethren, the Aldermen of the said city, thereby commanding them, upon the receipt of the said writ, to certify and remove the records of the said cause, &c. and all proceedings thereupon, into this honourable court; and that your said orator may be relieved in all and singular the premises, according to equity and good conscience; and that
the

the said defendants may stand to observe
and perform such order and decree
therein as to your honours shall seem
meet; and your orator shall ever pray,
&c.

J. H.

*Of Bills to perpetuate the Testimony
of Witnesses to a Will.*

Bill to perpetuate the testimony of witnesses to a will.

WHERE lands are devised by will, and there is no occasion or opportunity to prove and establish it at law, it is often thought necessary to perpetuate the testimony of the witnesses thereto in a court of equity.

Proceedings thereon.

The way to proceed in this suit, is to exhibit the bill against the heir at law, and therein set forth the will in *hac verba*. The defendant having appeared and answered, the parties must proceed to issue as in other cases, and then examine all the witnesses, if living, to the proof of the original will, or prove the handwriting of such of them as are dead, which being done, and publication passed, there is an end of the cause.

This court will not try the validity of a will, but if it comes collaterally in question, the court will direct an issue.

Although a court of equity suffers examinations to perpetuate the testimony of witnesses to a will, yet it will not barely try the validity of a will; but if the
same

same comes collaterally in question, upon a bill for the performance of a trust, or touching a devise out of lands, &c. the court will sometimes direct an issue at law to try the validity. *Prac. Reg.* 37.

After publication of the depositions of witnesses, proving the due execution of a will, is passed; in order the better to perpetuate their testimony, it is usual to inroll the pleadings with the commission interrogatories and depositions, and afterwards to exemplify them under the seal of this court; and the exemplification of these records becomes evidence, in support of the title of the devisee, in all courts of law and equity.

Depositions inrolled and exemplified, in proof of a will, are evidence in all courts.

Where a bill is brought against the heir at law to perpetuate the testimony of the witnesses to a will, and by his answer does not either confess or deny its validity, but leaves the plaintiff to make such proof of the due execution of it as he shall be advised, and though the defendant exhibits interrogatories to cross examine the witnesses, and cross examines them accordingly, yet, by the practice of the court, he is intitled to

Bill brought to perpetuate the testimony of witnesses to a will, the heir at law shall have his costs.

be paid his taxed costs as an heir at law disinherited.

Plaintiff to
shew cause why
not.

Bill to perpetuate the testimony of witnesses to a will, the witnesses being examined, the defendant moved for his costs, and obtained an order to shew cause why not. *Bower v. Tomson, 27th Oct. 1742, in Scac.*

N. B. It does not appear by the register's book that any cause was shewn.

*Of Bills to Examine Witnesses in
Perpetuam Rei Memoriam.*

A Bill to perpetuate the testimony of witnesses must shew a title in Bill to examine witnesses in perpetuam rei. the plaintiff to the thing whereto the testimony relates, stating, that the witnesses are old, infirm, or sick, and not likely to live long, or that they are going to sea, or beyond seas, whereby the parties are in danger of losing the benefit of their testimony; for this purpose the bill must pray, that the plaintiff may be at liberty to examine his witnesses, to the end that their testimony may be perpetuated and preserved, and that process of *subpœna* may issue, directed to the parties interested, to shew cause, if they can, to the contrary.

In a bill for this purpose, which is the sole object of the suit, if the plaintiff prays relief, the bill shall be dismissed.
2 Ventr. 366.

E. 2

By

Proceedings thereon, as prescribed by part of the 35th general rule of the court.

By the first part of the 35th general rule of the court, where a bill shall be exhibited to examine witnesses *in perpetuam rei memoriam*, and the defendant, being served with process, doth not appear, but stands in contempt, the plaintiff may then, upon motion, have a commission to examine his witnesses; and where the defendant shall have appeared, he may join in commission, if he thinks fit, and cross examine the plaintiff's witnesses, he striking commissioners names within four days after the making the order for such commission.

By motion to the court founded upon an affidavit.

This application to the court must be made upon an affidavit, shortly stating the interest of the plaintiff in the matter relative to which he prays a commission to perpetuate his evidence, and also the names, additions, and ages, of his witnesses, or other circumstances applicable to the situation in which they stand, in order to induce the court to grant such commission.

Defendant may cross examine the witnesses, but if he has any to examine, he must also file a bill to perpetuate.

In a suit of this nature, the defendant may cross examine the plaintiff's witnesses, but he cannot examine any witnesses

nesses on his part under this commission. If the defendant has any to examine, he must also file a bill to perpetuate their testimony.

Depositions taken on these bills are not ordinarily to be published, but upon oath that the witnesses are dead. *Prac. Reg.* 35, 36.

Depositions not to be published until the witnesses be dead.

After publication is passed on a bill to perpetuate, the plaintiff shall not be admitted to have any more examinations on his behalf, touching the same matter.

No farther examinations after publication.

Bill brought to examine witnesses *in perpetuam rei memoriam*, to prove a *modus decimandi*; the defendant demurred, for that the bill was to establish a custom against the church, and in prejudice of tithes which are due *communi jure*; and several precedents were cited, where bills, to have a *modus* decreed, were upon demurrer dismissed; but this bill being only to preserve testimony, the Lord Keeper thought it reasonable the defendant should answer, and overruled the demurrer. 1 *Vern.* 185.

Bill to perpetuate, &c. to prove a *modus decimandi*, allowed upon demurrer.

Bill to perpetuate, touching a title, demurrer allowed, plaintiff not having tried his right at law.

Bill brought to examine witnesses to preserve their testimony, touching the plaintiff's title to certain lands mentioned in the bill. The defendant demurred, because there was no impediment to the plaintiff from trying his right at law, and that he had not obtained any verdict in affirmation of his pretended title; and the demurrer was allowed. 1 *Vern.* 441. *Parry v. Rogers.*

Bill to perpetuate, no costs given against the defendant; on the contrary he always receives them.

In a bill to perpetuate the testimony of witnesses costs are never given against the defendant. 1 *Atk.* 610. But on the contrary, by the practice of the Exchequer, he always receives them when taxed; and after the commission for the examination of the witnesses is returned, the defendant delivers his bill of costs to the plaintiff, which, to save the expence of an application to the court for a reference to the master to tax it, is usually settled by the clerks in court for each party.

Of Bills of Discovery.

A Bill of discovery, usually distinguished by that title, is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things, in his custody or power, and seeking no relief in consequence of the discovery. This bill is commonly used in aid of the jurisdiction of some other court, as to enable the plaintiff to prosecute or defend an action at law, a proceeding before the King in council, or any other proceeding of a nature merely civil, before a jurisdiction which cannot compel a discovery on oath. It must state the matter touching which a discovery is sought, the interest of the plaintiff and defendant in the subject, and the right of the first to require the discovery from the other. *Mitf. on Plead.* 52.

Bill of discovery, what.

If the bill seeks a discovery of deeds or writings, and also prays such relief as might be obtained at law, if the deeds

Bill for a discovery of deeds praying relief, an affidavit must be annexed, that they are not in the custody or power of the plaintiff.

or writings were in the custody of the plaintiff, he must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant; but a bill for discovery merely, or which only prays the discovery of deeds or writings, or equitable relief grounded upon them, does not require such an affidavit. 2 *P. Wms.* 541. 3 *Atk.* 132. *Mitf. on Plead.* 52, 53.

Bill for discovery and establishing of deeds only (having the counterpart), affidavit must be annexed, that plaintiff has not the original deeds.

If relief as well as discovery be prayed, an affidavit is not necessary.

Bill preferred for a discovery of deeds only, and (having the counterpart) to have the deeds established, the plaintiff must annex an affidavit to his bill, that he has not the original deeds, nor any other person in trust for him, or else it is cause of demurrer; but if there is relief prayed as well as a discovery (as where the heir prefers a bill against a mortgagee to have a mortgage-deed delivered up, suggesting the same has been satisfied, and that he has lost the counterpart), there is no need of an affidavit.

Johnson v. Elleker. Bunb. 46.

A plaintiff having the benefit of a discovery from the defendant's answer, must pay him his costs.

Where a bill is brought for a discovery only, and the plaintiff has the benefit of

of a full discovery, by the defendant's answer, the plaintiff has thereby obtained the end of his bill, and does not proceed further therein; in which case a defendant is intitled to his costs to be taxed; but he cannot move the court for the payment of them till after the expiration of the time which, by the practice of the court, a plaintiff has to except to the answer; viz. within the first four days of the following term next, after the defendant puts in his answer. After the expiration of this time, it is a motion of course for the defendant to apply to the court for an order that he may be paid his costs, and that the same may be referred to the Deputy Remembrancer to be taxed, the bill being brought for a discovery only, and the plaintiff having had the benefit thereof.

Costs moved for of course upon the expiration of the first four days in the term next after the coming in of the answer.

It is no part of this motion to dismiss the plaintiff's bill; for, in this stage of the cause, the bill is not in a state of dismissal; and the order above-mentioned being obtained, has, to all intents and purposes, the effect of an order of dismissal to a defendant, the end of the suit being answered.

The motion for costs does not extend to a dismissal of the bill.

If

Bill grounded on the loss of a bond, plaintiff must make an affidavit.

If the bill be grounded on the loss of a bond, it is the loss which entitles the court to jurisdiction, and affidavit must be made of it. 1 *Chan. Ca.* 231.

Bill brought for a general discovery of deeds, an affidavit is not necessary; *secus* as to the discovery of a particular bond.

When a bill is exhibited for a general discovery of deeds, it is not necessary for the plaintiff to annex the usual affidavit, that he has none of them in his custody; but where the bill is for a discovery of a particular bond, for want of which the plaintiff could not recover his debt at law, or the possessor in ejectment, in these cases it is fit he should make oath that he himself has not the bond or deed, because, if he had, his remedy is proper and open at law; in which case he is not to put another to the unnecessary expence of an answer to deny his having it. *Preced. in Chanc.* 536.

Bill for relief and discovery of deeds, affidavit must be annexed.

If a bill be brought for relief, as well as discovery, of deeds, an affidavit must be annexed, that plaintiff has not the deeds in his custody, or defendant may demur. 3 *Atk.* 17. *Anon.*

Where

Where a bill is brought to be relieved against a deed fraudulently cancelled by the defendant, and to have another deed executed, the plaintiff need not make oath of the loss of the deed, because he could not have any remedy at law, though the deed was in his hands. *Moseley*, 192. *King v. King*.

Bill to be relieved against a deed fraudulently cancelled, and to have another deed executed, does not require an affidavit.

Every heir at law has a right to a discovery by what means, and under what deed, he is disinherited. *Harrison v. Southcote*. 1 *Atk.* 528.

Heir at law has a right to discover by what means he is disinherited.

Bill lies for a discovery of court-rolls, ledgers, &c. to be used at a trial which relates to plaintiff and defendant. *Hard.* 180.

Bill lies for a discovery of court-rolls to be used at a trial.

A bill for the discovery of a note, deed, &c. lies after six years are elapsed, for the statute of limitations is no plea to it. *Ch. Rep.* 14. *Dean, &c. of Westminster v. Crofs.* *Bunb.* 60.

Statute of limitations no plea to the discovery of a note, deed, &c.

The lord of a manor brought a bill of discovery of treasure trove. *Per curiam*. The bill is proper enough as to the discovery, but he can have no relief, because

Lord of a manor may bring a bill of discovery for treasure trove, but his relief is in trover.

cause he may bring trover; and the bill was dismissed with costs. *Sloane v. Heathfield.* *Bunb.* 18.

In what cases a bill of discovery will not lie.

A bill of discovery does not lie of things not examinable or relievable in equity, as the ill usage of a husband to a wife. *1 Vern.* 204.

Nor for the discovery of a tenant of the freehold, in order to bring a *formedon.* *1 Vern.* 212, 273.

Nor for a discovery to create evidence for a future cause. *Finch v. Finch.* *2 Vez.* 491.

A bill of discovery does not lie in aid of the jurisdiction of the ecclesiastical court, for they can come at discovery themselves. *Dunn v. Coates.* *1 Atk.* 288.

Bill for a discovery of a deed upon the suggestion of a trust; if the defendant denies the trust, he shall not be obliged to produce the deed. *2 Vern.* 463.

A bill

A bill for the discovery of deeds, or a title, does not lie against him who is a purchaser for a valuable consideration without notice, and hath obtained verdict and judgment in ejectment. *Chan. Rep.* 35.

To a bill of discovery of title-deeds, or purchase, if the defendant denies notice, he need only set forth the purchase-deed, and may plead his purchase in bar to the discovery of the title-deeds; for a purchaser may, subsequent to his purchase, have found out a defect in his title; and if he should produce title-deeds, they might be made use of to overturn his title at law. 3 *Atk. Ashton v. Ashton.*

Bill of discovery does not lie against a person to discover what *may* subject him to a penalty, not what *must* only. 2 *Vez.* 389, 245.

It was determined by Lord Hardwicke, that the defendant was not obliged to discover by answer whether he be a papist or not. On the marriage of Mrs. Pain with Mr. Smith a settlement was made

made to the use of husband and wife for their lives, and after to the first and other sons of that marriage in tail, remainder to Mrs. Pain in fee, who devised it to the defendant; and the bill was to discover if the devisor was not a papist, in which case the devise would be void. On plea to this bill Lord Chancellor held, that defendant was not obliged to answer. *Atk. 526, Pl. 254. 8 Vin. Abr. Pl. 21, in notes.*

of

Of Supplemental Bills.

WHERE the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely. Thus a supplemental bill may be filed to obtain a farther discovery from a defendant, to put a new matter in issue, or to add parties where the proceedings are in such a state that the original bill cannot be amended for the purpose; and this may be done as well after as before a decree; and the bill may be either in aid of the decree, that it may be carried fully into execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it; or to bring formal parties before the court; or it may be used as a ground to impeach the decree. But wherever the same end may be obtained by amendment, the court will

A supplemental bill, what.

will not permit a supplemental bill to be filed. *Mitf. on Plead.* 59.

So when any event happens, subsequent to the time of filing an original bill, which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, or a new interest to the party, as the happening of some other contingency, the defect may be supplied by a supplemental bill; or if any event happens which occasions any alteration in the interest of any of the parties to a suit, and does not deprive a plaintiff, suing in his own right, of his whole interest in the subject, as in the case of a mortgage, or other partial charge of interest; or if a plaintiff, suing in his own right, is entirely deprived of his interest, but he is not the sole plaintiff, the defect arising from this event may be supplied by a bill of the same kind. *Ibid.* 60.

It is not very accurately ascertained in the books of practice, or in the reports, in what cases a suit becomes defective without being absolutely abated; and in what cases it abates as well as becomes defective.

defective. But upon the whole it may be collected, that if, by any means, any interest of a party to the suit, in the matter in litigation, becomes vested in another, the proceedings are rendered defective in proportion as that interest affects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained. And if such a change of interest is occasioned by, or is the consequence of, the death of a party, whose interest is not determined by his death, or the marriage of a female plaintiff, the proceedings become likewise abated or discontinued, either in part or in the whole. So upon the death of a defendant all proceedings likewise abate as to that defendant. But, upon the marriage of a female defendant, the proceedings do not abate, though her husband ought to be named in the subsequent proceedings.

Ibid. 55.

A supplemental bill must state the original bill, and the proceedings thereon; and if the supplemental bill be occasioned by any event subsequent to the original bill, it must state that event, and the

Supplemental
bill how framed.

consequent alteration with respect to the parties; and in general the supplemental bill must pray, that all the defendants may appear and answer to the charges it contains. For if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if it has not been heard before; and if the cause has been heard before, it must be further heard upon the supplemental matter. If indeed the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited by the plaintiff in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only, unless, which is frequently the case, the interest of the other defendants may be affected by that decree. *Ibid.* 69. 3 *Atk.* 217.

A supplemental bill to bring formal parties before the court as defendants, does not require the defendant to the original suit to be made parties.

Where a supplemental bill is merely for the purpose of bringing formal parties before the court as defendants, the parties, defendants to the original bill, need not in any case be made parties to the supplemental. 3 *Atk.* 217.

Where

Where a supplemental bill is brought for any new matter discovered since the hearing of the cause, before the former decree is signed and inrolled, if the defendant to such bill is able to shew there is not any new matter discovered, he must take advantage by plea or demurrer, and it is too late to insist upon it at the hearing. 2 Atk. 40. *Lewellin v. Mackworth.*

Supplemental bill brought for discovery, new matter discovered since the hearing, and none shewn, defendant must plead or demur.

Where the assignees of a bankrupt die, or are discharged, and others are put in their room, there is no privity between the bankrupt and the assignees, or at least but an artificial one, and therefore they cannot revive, but must bring a supplemental bill to intitle themselves to the benefit of the proceedings in a former suit. 1 Atk. 88. *Anon.*

Assignees of a bankrupt dying, or discharged, and others put in their room, the new ones must bring a supplemental bill.

A supplemental bill was brought for the discovery of more evidence, touching a matter of account, to which the defendant pleaded the former bill, and that the cause was heard, and the account directed, but the defendant was ordered to answer to all matters in this bill, not answered unto in the former cause, and

Supplemental bill for discovery of more evidence after an account directed, defendant ordered to answer, but plaintiff not to reply or proceed without further order.

the plaintiff not to reply or proceed any further without order. 2 Chan. Rep. 142. *Bowe v. Skipwith.*

In a bill of review a supplemental bill may be added. 1 Vern. 135. *Price v. Keyte.*

Supplemental bill after publication witnesses not to be examined to matters in issue, and not proved in the original cause.

Where a supplemental bill is brought after publication, it is irregular to examine witnesses to a matter that was in issue, and not proved in the original cause, and such proof is not to be read. If there be no proof to the new matter in the supplemental bill it must be dismissed. *Bagnal v. Bagnal.* Vin. Abr. tit. Chan. 439, c. 8.

In what manner the original and supplemental bills become consolidated.

Where the proceedings in the supplemental cause are as forward as those in the original suit, one replication may be filed in both causes, and they thereby become consolidated; or where it happens, in the course of proceedings, that a replication may be filed in each cause, then, upon giving a rule to pass publication, the causes also become consolidated, and are proceeded in as one cause.

Of

Of Bills of Revivor.

A Bill of revivor must state the original bill, and the several proceedings thereon, and the abatement; it must shew a title to revive, and charge that the cause ought to be revived, and stand in the same condition, with respect to the parties to the original bill, at the time the abatement happened; and it must pray that the suit may be revived accordingly. It may be likewise necessary to pray that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets, by the representative of a deceased party. In this case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor merely; but, if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party, to answer the demands made against it by the suit; and the prayer of the bill therefore, in such case, usually is, not only that the

Bill of revivor,
what.

suit may be revived, but also that in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken, and so far the bill is in the nature of an original bill.

Mitf. on Plead. 70.

If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray, that the person, against whom it seeks to revive the suit, may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered. *Ibid.* 71.

How and in what time proceedings may be revived.

If a defendant, served with process upon a bill of revivor, shall not answer the same within eight days after his appearance thereto, or shall obtain an order for time to answer, it is a motion of course to revive the former proceedings, upon a suggestion, that the time for answering is expired, or that the defendant hath

hath obtained an order for time to answer, and thereupon the following order is made:

the day of 1789.

Between *A. B.* sole acting executor, named in the last will and testament of *C. D.* deceased, plaintiff.

And
E. F. and *G. H.* defendants.

By original bill, and bill of revivor.

Upon the motion of Mr.
of counsel, on behalf of the plaintiff,
informing the court that the said *C. D.*
filed his original bill in this court, in
term last, against the said defendants,
for the purposes therein mentioned,
to which bill the said defendants
appeared and put in their answers (*here
state the death of the party, and to whom
letters of administration have been granted,
and then proceed thus*), and further in-
forming the court that the said plaintiff,
in term last, exhibited
his bill of revivor in this court against
the said defendants, to which bill they
had appeared, but that the time for an-
F 4 swering

Order to revive,
either on time
for answering
being expired,
or on obtaining
time to answer.

swering the same was now expired (or that the defendant had obtained an order for time to answer the said bill, as the case may be). It was therefore prayed, that the said suit and proceedings which had so abated, as aforesaid, might stand revived, and be in the same plight and condition against the said defendants as they were in at the time of the death of the said C. D.; and that the said plaintiff might have the same relief against the said defendants as the said C. D. would have been intitled to in case he had been living, which is by the court hereby ordered as prayed.

Or on answering, and not shewing cause to the contrary.

This order may also be obtained if the defendant puts in an answer, and shews no cause against reviving the suit in the manner prayed by the bill.

A defendant, who has not put in his answer to the original bill, may be omitted in the bill of revivor. 1 Vern. 308. Hard. 201.

If one plaintiff refuses to join in a bill of revivor, the other may bring such bill,

bill, and make him who refuses a defendant. *Ca. Eq. Abr. 2.*

So revivor upon revivor lies until the interest of the thing in question be determined. *Hard. 201.* Agreed *per curiam*, especially in case of death.

No bill of revivor can be brought to revive a decree relative to costs only, unless the costs be taxed, and a report made in the life-time of the party, for this is *actio personalis et moritur cum persona*; but if by the decree the party is to pay a sum of money, or if a duty is decreed, if he is to deliver up a bond, or deeds, or writings, or if any thing is annexed to the decree, besides costs, the suit may be revived, but it can never be revived for costs only. *2 Chan. Rep. 195.*

Bill of revivor does not lay for costs only.

The plaintiff preferred his bill against the defendant for tythes, and had a decree for an account, but before the costs were ascertained the defendant died; the plaintiff revived against the executor, and, upon the question, whether the defendant should pay costs? this distinction was taken, that if the revivor against the

Upon a bill of revivor for the duty as well as the costs, an executor's defendant shall pay his costs; *aliter* when the revivor is only for the costs to be ascertained.

the defendant had been only for costs which had not been ascertained in the life-time of the testator, then the defendant should not have paid costs; but here the revivor was for the duty as well as the costs, and therefore the defendant, though an executor, should pay costs. *Sir Edw. Delavall v. Sir Edw. Blackett. Bunb. 45.*

Bill of revivor for the duty and costs not taxed in the first defendant's life-time.

Bill of revivor, both for the duty (which was 3*l.* 6*s.* 8*d.* for tithe-milk and Easter offerings) and costs, against the defendants, as executors to the first defendant, who died after the decree, but before the costs were taxed; and therefore it was objected for the defendant, that the costs not being ascertained in the life-time of the party, by taxation, there could be no revivor for them now; but, *per curiam*, although there can be no revivor for costs alone, yet there may be for duty and costs; and decreed accordingly. *Dodson v. Oliver. Bunb. 160. 2 Chan. Rep. 7.*

In what case costs in the original cause are lost upon revivor.

A bill of revivor against the defendant's father for lands, and revived against the defendant as heir, and dismissed with costs,

costs, the defendant cannot have costs expended by his father before the revivor, for they died with him. 3 Chan. Rep. 65. *Lloyd v. Powis.*

And if there be neither privity in blood or in representation, as in the case of an assignee or devisee, the cause must be revived by an original bill, in the nature of a bill of revivor, praying that a parallel decree may be made. *Cha. Ca.* 122, 174.

Bills filed by creditors, the deaths of any of them will not abate the proceedings, because the parties remaining may sustain the suit, and are competent to call upon the court for a decree; or when the interest of the party dying so determines as no longer to affect the suit, as in the case of a tenant for life, and no person becomes intitled thereupon to the same interest, no discontinuance is occasioned by the death of that party; and in the instance of bills filed by creditors, if one die, the surviving parties can sustain the suit: so if an administrator, as guardian to an infant executor, sue, and *pendente lite* the infant comes of full age,

In what cases suits do not abate.

Not in a bill by creditors if any of them die.

Or by death of a party, whose interest is thereby determined as tenant for life, &c.

age, it is not necessary to revive. And in the case of bills filed by or against trustees or executors, joint tenants, joint obligees, joint obligors, or by or against husband and wife *jure uxoris*, and the husband dies, the right survives, and the proceedings do not abate. If indeed, upon the death of the husband of a female plaintiff, suing in her right, the widow does not proceed in the cause, the bill is considered as abated, and she is not liable to costs; but if she takes one step in the cause, the suit may proceed without a bill of revivor, for she alone has the whole interest, and the husband was party in her right. 3 *Chan. Rep.* 40. *Talb.* 14.

Nor by the marriage of a *feme sole* plaintiff or defendant.

Bill by a *feme sole*, and before answer she marries, it is not necessary to revive. If a bill be filed against a *feme sole*, who after answer marries, there is no need of a bill of revivor, for the husband shall be concluded by her answer.

The case is the same if a female plaintiff marries pending the suit, and afterwards, before revivor, her husband dies, for

for then her incapacity to prosecute the suit is removed.

Where a bill is brought by husband and wife for a demand in her right, and he dies, the cause does not abate. *2 Atk. 726. Anon.*

Bill by husband and wife for a demand in her right, and the husband dies, the suit does not abate.

An assignee, or a purchaser, shall not have a bill of revivor for want of priority. *1 Vern. 427. Eq. Ca. Abr. 3.*

An assignee or a purchaser cannot revive.

A devisee cannot have a bill of revivor, for he does not represent the devisor, but is in nature of a purchaser. *1 Chan. Ca. 174.*

Not a devisee, for he is in nature of a purchaser.

A creditor allowed to come in and prove his debt, and pay his contribution, may revive, though he was not plaintiff originally. *Eq. Ca. Abr. 3.*

But a creditor may revive.

A defendant cannot revive but in one instance, and that is after a decree to account, because in that case he is considered as an actor; for, till the account is taken, it is not known on which side the balance will fall. *3 Atk. 691. Preced. in Chan. 197. 2 Vern. 219, 297. 1 Wms. 263, 743.*

In what case a defendant may revive.

On

On a bill of revivor plaintiff cannot dispute the decree, though the defendant may. 2 Vez. 232.

Proceedings in
cross causes are
not revived
without a bill
in each, except
as to matter of
account decreed.

Proceedings in cross causes are not revived without a bill of revivor in each, except as to any matter of account decreed, and there a bill in one cause, praying the whole may be revived, revives the whole.

No costs paid
on amending
bill of revivor.

A bill of revivor may be amended without payment of twenty shillings costs.

After a decree to account and abatement of the suit, by the defendant's death, his representative may revive. *Kent v. Kent. Preced. in Chan.*

Original bill by
a devisee, in
nature of a bill
of revivor, de-
fendant shall
not make a new
defence.

If a devisee bring an original bill, in the nature of a bill of revivor, the defendant shall not be at liberty to make a new defence, for this bill is only to supply the want of privity; and the decree ought to be carried on in the same manner as it would have been on a bill of revivor, if the plaintiff had claimed in privity; and there is no reason why the devisee should not have the same
advan-

advantage of the decree as an heir or executor, without entering into the merits of the cause; and the decree on this bill ought not to be longer or shorter than the first. 2 Vern. 548.

So if a bill, in the nature of a bill of revivor, be brought against a devisee, he cannot dispute the justice or validity of the decree, for then he would be in a better case than an heir or executor.

2 Vern. 672.

A decree to account, and the parties die, if the executors or administrators do not revive within six years, this is not within the statute of limitations.

1 Wms. 742.

Nor can a devisee, on such a bill brought against him, dispute the decree.

Decree to account, though not revived within six years, yet not within the statute of limitations.

Where a decree hath been obtained, and the suit abates, and the decree is sought to be carried into execution, it may be done three ways.

Abatement after a decree, how the decree may be carried into execution.

If the decree be inrolled, the party may sue out a *subpœna scire facias* against the heir or executor of the defendant, to shew cause against the decree, but this is only after an inrollment, and not before;

1. By *subpœna scire facias*.

before; for when the decree is not signed and inrolled, a bill of revivor must be brought.

This *scire facias* formed from the *scire facias* at common law.

This writ was formed from the *scire facias* at common law; for when the decree is inrolled, it is in the nature of a judgment, and a *subpoena scire facias* is for the heir or executor to shew cause why there should not be execution.

No demurrer to this *scire facias*, but the party may shew cause why he should not be charged.

To this writ of *subpoena scire facias* the defendant cannot demur, for it is not of record, nor any where filed, and therefore the party must, upon motion, at the return of the *subpoena*, shew cause (if any he hath) why he should not be charged. 1 Vern. 426.

2. By bill of revivor.

2. As the party may have a *subpoena scire facias* after inrollment, so he may file a bill of revivor either before or after inrollment.

3. By original bill, praying that a parallel decree may be made.

3. The plaintiff may bring an original bill, praying that a parallel decree may be made. And in the case of *Spranger v. Wray*, 1 Kern. 463, it was adjudged, that where the suit abates the plaintiff may

may either bring an original bill, or a bill of revivor, at his election. 1 Cha.

Ca. 37. 1 Vern. 476.

But where a decree is not signed and inrolled, a bill of revivor must be brought. 2 Cha. Pract. 105.

When a suit became abated after a decree signed and inrolled, it was anciently the practice to revive the decree by a *subpœna* in the nature of a *scire facias*, upon the return of which, the party to whom it was directed might shew cause against the reviving of the decree, by insisting that he was not bound by the decree, or that for some other reason it ought not to be enforced against him, or that the person suing the *subpœna* was not entitled to the benefit of the decree. If the opinion of the court was in his favour, he was dismissed with costs. If it was against him, or if he did not oppose the reviving of the decree, interrogatories were exhibited for his examination, touching any matter necessary to the proceedings. If he opposed the reviving of the decree, on the ground of facts which were disputed,

Decree anciently revived by *subpœna scire facias*, now indiscriminately by bill.

he was also to be examined upon interrogatories, to which he might answer or plead; and issue being joined, and witnesses examined, the matter was finally heard and determined by the court. But if there had been any proceeding subsequent to the decree, this process was ineffectual, as it revived the decree only, and the subsequent proceedings could not be revived but by bill; and the inrollment of decrees being now much disused, it is become the practice to revive in all cases indiscriminately by bill. *Mitf. on Plead. 64.*

Cause in support
of the present
practice by bill.

Where an heir
may controvert
the decree.

A decree obtained against the ancestor, and his heir does not claim under that title, but by virtue of another title paramount, there the decree can never be carried into execution against him by *subpoena scire facias*. As when an estate is decreed against a man, and his heir insists that his father had no title thereto, or was only tenant for life thereof, the decree in that case can never be carried into execution against him, for he is at liberty to controvert the justice and validity of that decree; he may make a new defence from what his ancestor did, and

and vary his case as he shall be advised, and the parties go into a new examination of the matter, and the cause heard *de novo*, on which the court will judge whether the decree is right or not, and may affirm or reverse it at their pleasure.

But when one obtains a decree against another for a real estate, and the party dies before the plaintiff is put into possession, in that case, if the heir at law claims the estate by descent under his ancestor, or as devisee under him, he shall never controvert the justice of the decree, though his ancestor should have mistaken his defence; nor shall he be at liberty to make a new defence, or enter into a new proof, so as to overthrow the former decree, especially when it appears to the court that the decree hath been of antient standing.

Where the heir may not controvert the decree.

Of Bills of Revivor and Supplement.

Bill of revivor
and supple-
ment, what.

A Bill of revivor and supplement is merely a compound of those two species of bills, and in its separate parts must be framed and proceeded upon as such. *Mitf. on Plead.* 74.

If a suit becomes abated, and by any act, besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement, or a devise, under certain circumstances, though a bill of revivor merely may continue the suit, so as to enable the parties to prosecute it, yet, to bring before the court the whole matter necessary for its consideration, the parties must, by a supplemental bill added to and made part of their bill of revivor, shew the settlement, or devise, or other act by which their rights are affected. So in the same manner if any other event, which occasions an abatement, is accompanied or followed by any matter which

which becomes necessary to be stated to the court, to shew the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to shew, by or against whom the cause is to be revived; that matter must be set forth by way of supplemental bill added to the bill of revivor.

Species of bills, and in its separate parts must be framed and proceeded upon as such. *Miss. on Plead. 74.*

If a suit becomes abated, and by any act, besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement, or a devise, under certain circumstances, though a bill of revivor merely may continue the suit, so as to enable the parties to prosecute it, yet, to bring before the court the whole matter necessary for its consideration, the parties must, by a supplemental bill added to and made part of their bill of revivor, shew the settlement, or devise, or other act by which their rights are affected. So in the same manner if any other event, such as an abatement, is the cause of the suit, or followed by any matter which

Of Bills in the Nature of Original Bills, though occasioned by, or seeking the Benefit of, former Bills.

1. CROSS bills.

2. Bills of review, to examine and reverse decrees signed and inrolled.

3. Bills, in the nature of bills of review, to examine and reverse decrees, either signed or inrolled, or not, brought by persons not bound by the decrees.

4. Bills impeaching decrees upon the ground of fraud.

5. Bills to suspend the operation of decrees on special circumstances, or to avoid them, on the ground of matter subsequent.

6. Bills to carry decrees into execution.

7. Bills

7. Bills in the nature of bills of revivor.

8. Bills in the nature of supplemental bills: *Mitt. on Plead.* 74.

Of Cross Bills.

Cross bill what,
and by whom
brought.

A Cross bill is a bill brought by a defendant against a plaintiff, or other parties, in a former bill pending, touching the matter in question in that bill. A bill of this kind is usually brought to obtain either a necessary discovery, or full relief to all parties. It frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross bill, or cross bills, to bring every matter in dispute completely before the court, litigated by the proper parties, and upon proper proofs. In this case it becomes necessary for some or one of the defendants to the original bill to file a bill against the plaintiff, and other defendants in that bill, or some of them, and bring the litigated point properly before the court. A cross bill should state the original bill, and proceedings thereon, and the rights of the party exhibiting the bill, which are necessary to be made the subject

ject of cross litigation, or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. But a cross bill being generally considered as a defence, or as a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not at least, as against the plaintiff in the original bill, obliged to shew any ground of equity to support the jurisdiction of the court. *Mist. on Plead.* 175.

It is the established practice of the court, that the defendant in the original bill shall first answer that bill, before the defendant in the cross bill shall be compelled to answer it, and this is grounded upon priority of suit.

The original bill shall be answered before the cross bill.

Though a letter missive to a peer is not such process as subjects the party to a contempt, yet it is such process as gives the party suing it out priority of suit: if a man therefore files a bill, and takes out no process upon it, if a cross bill be filed, the plaintiff in the original cause, cannot compel the defendant to answer his bill first, he having taken out

Letter missive to a peer.

Bill and cross bill, who shall or shall not be compelled to answer first.

no

no process on his bill. *Price v. Lord Caningsby. Bunb. 124.*

Where a cross bill is filed before the original bill is answered, the defendant in the cross cause may have an order for time to answer till after the defendant shall have answered the original bill.

If a cross bill be filed before the defendant in the original cause has answered, upon the defendant in the cross bill being called upon for his answer, it is a motion of course for him to obtain an order for six weeks, or a month (as he may be circumstanced), to answer the cross bill, after the plaintiff in this cause; and defendant in the original cause, shall have answered the original bill.

If the original bill be amended after the cross bill is filed, the original plaintiff loses his priority.

But if the original bill be amended, in things material, after the cross bill is filed, the amended bill, as to the amendments, is a new bill, and the plaintiff in the original bill shall be obliged to answer the cross bill before such time as the plaintiff in the original bill shall have an answer to his amendments; and as the amended bill must be answered altogether, so the priority in such case seems to be lost as to the whole. *2. R. Wms. 435.*

And an insufficient answer is no answer.

A brings his bill against *B* and *C*. who put in insufficient answers, and prefer

fer their cross bill against *A.*; afterwards *B.* becomes bankrupt, his assignees bring their bill, in nature of a bill of revivor, against *A.* they shall not go on till *C.* has answered *A.*'s bill. 1 P. Wms. 266.

A cross bill may be filed at any time before publication passes in the original cause. In the case of *Dr. Scott v. Allgood and others*, in this court, in Easter term 1787, a rule was given to pass publication, unless cause, in eight days; in the mean time the defendants filed three cross bills against *Dr. Scott* for the establishment of the several *modusses* which they had set up by their answers to the original bill, and, upon notice, they obtained an order, on the 5th of May, that publication in the original cause should be enlarged till the plaintiff in that cause should have answered the cross bills. It being discovered that these three cross causes were brought for the same matters, involved the like question, and sought the same relief; in Trinity term following, on a motion to consolidate these causes, and that they, with the original cause, might be heard together, the order of the 5th of May was

In what time a cross bill may be filed, so as to stay proceedings in the original cause, that both causes may be heard together.

Before publication passes in the original cause.

Three cross bills filed upon enlarging publication in the original cause.

so

Defendant answered one of them, and the three were ordered to be consolidated, and publication passed in the original cause.

Plaintiffs replied in the cross suits, obtained an order for a commission to examine their witnesses, and that the original and cross causes should be heard together.

so far varied as that the defendant in the cross causes should answer one instead of the three cross bills, and it was further ordered, that the original cause should be heard alone in Michaelmas term following, if the cross causes were not then ready for hearing, and that the plaintiff should shew cause, the first day of that term, why the cross bills should not be consolidated. The day preceding the first day of this term the defendant put in his answer to one of the cross bills, which were now ordered to be consolidated, and publication passed in the original cause, which was also set down in the paper for hearing, but did not come on to be heard, on account of other causes which stood before it. In Hilary term following, 1789, the plaintiffs in the cross causes replied to the defendant's answer, and then moved for a commission to examine their witnesses in the cross causes, and that both causes should come on to be heard together: this was opposed by the plaintiff in the original cause, as being irregular after publication had passed in that cause; and that in asking for a commission to examine in the cross causes, it could tend only to cure

cure the defects of that evidence which they had adduced in support of their defence in the original suit; and that if this practice was to prevail it might lead to consequences injurious to the justice of the court. But *per curiam*, the plaintiffs in this case have a right to their commission, and the defendant may, if he thinks proper, join therein; and a commission was accordingly ordered.

first day of this term the defendant put in his answer to one of the cross bills, which were now ordered to be controlled, and publication passed in the original cause, which was also set down in the paper for hearing, but did not come on to be heard, on account of other causes which stood before it. In Hilary term following, 1789, the plaintiffs in the cross causes replied to the defendant's answer, and then moved for a commission to examine their witnesses in the cross causes, and that both causes should come on to be heard together: this was opposed by the plaintiff in the original cause, as being irregular after publication had passed in that cause; and that in asking for a commission to examine in the cross causes, it could tend only to

Defendant answered one of the cross bills, and the other three were ordered to be controlled, and publication passed in the original cause.

The defendant moved in the cross causes, and the court ordered an order to be made for a commission to examine the witnesses in the cross causes, and that both causes should come on to be heard together.

Of Bills of Review.

Bill of review,
what.

A Bill of review is to procure an examination and reversal of a decree made upon a former bill, and signed by the Lord Chief Baron, and the rest of the Barons, and inrolled. It may be brought upon error of law appearing in the body of the decree itself, or upon discovery of new matter. In the first case the decree can only be reversed upon the ground of the apparent error, as if an absolute decree be made against a person who, upon the face of it, appears to have been at the time an infant. A bill of this nature may be brought without the leave of the court previously given. But if it is sought to reverse a decree, signed and inrolled upon discovery of some new matter, the leave of the court must be first obtained; and this will not be granted but upon allegation, upon oath, that the new matter could not be produced or used, by the party claiming, at the time when the decree was made. If the court is satisfied that
the

the new matter is relevant and material, and such as might probably have occasioned a different determination, it will permit a bill of review to be filed.

Mitf. on Plead. 78.

It is a rule of the court, that the bringing a bill of review shall not prevent the execution of the decree impeached; and if money is directed to be paid, it ought regularly to be paid before the bill of review is filed, though it may afterwards be ordered to be refunded. *Ibid.* 80.

In a bill of this nature it is necessary to state the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discovered, upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact of the discovery, though it may be doubted whether, after leave given to file the bill, that fact is traversable. The bill may pray

In what manner
a bill of review
ought to be
framed.

pray simply, that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the farther decree of the court to put the party, complaining of the former decree, into the situation in which he would have been if that decree had not been executed. *Ibid.* 80.

If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. The bill may also, if the original suit has become abated, be at the same time a bill of revivor. A supplemental bill may likewise be added, if any event has happened which requires it; and particularly if any person, not a party to the original suit, becomes interested in the subject, he must be made a party to the bill of review, by way of supplement. *Ibid.* 81.

To render a bill of review necessary, the decree must have been signed and inrolled.

To render a bill of review necessary, the decree sought to be impeached must have been signed and inrolled. If therefore this has not been done, a decree may be

be examined and reversed upon a species of supplemental bill, in the nature of a bill of review, where any new matter has been discovered since the decree.

As a decree not signed and inrolled may be altered upon a rehearing, without the assistance of a bill of review, if there is sufficient matter to reverse it appearing upon the former proceedings, the investigation of the decree must be brought on by a petition of rehearing; and the office of the supplemental bill, in nature of a bill of review, is to supply the defect which occasioned the decree upon the former bill.

If not signed and inrolled, it may be altered upon a rehearing.

It is necessary to obtain the leave of the court to bring a supplemental bill of this nature, and the same affidavit is required for this purpose as is necessary to obtain leave to bring a bill of review, on discovery of new matter. The bill in its frame nearly resembles a bill of review, except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard, with respect to the new matter made the subject of the supplemental bill,

bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case, made by the supplemental bill, requires. *Ibid.* 82.

Bill of review must not only shew the matter discovered to be new, but it must also be relevant.

Where parties apply for leave to bring a new bill, upon new matter discovered after a decree, they must shew that it is relevant; for the court will not, merely because it is new matter, direct a new bill to be brought where it is entirely vain and fruitless. 2 *Atk.* 530.

None but parties and privies can have this bill.

None but parties and privies, as heirs, executors, or administrators, can have this bill of review, since nobody else can be aggrieved by such decree. *Prac. Reg.* 53. *Gilb. Chanc.* 186.

A devisee cannot have it.

A devisee is not entitled to a bill of review, being not in privity to the testator against whom the decree was made. *Slingsby v. Hale.* 1 *Chan. Ca.* 123.

Nor an assignee.

Assignee cannot in any case have a bill of review. *Arg.* 1 *Vern.* 417. *Barbonne v. Searle.*

But

But where four defend for all the inhabitants of such a place, another inhabitant, not party or privy to any of the four defendants, shall have a bill of review. *Ca. Ch.* 272.

In what case review lies where a person is neither party or privy.

It is not cause for a review that a fact is false, for there can be no new examination after publication. *R. 1, Rol.* 382, *l. 30. Ch. Rep.* 37.

Not where a fact is false.

Nor for neglecting to have evidence which was known to the party at the time of the decree. *Ca. Ch.* 43. *1 Vern.* 166. *Eq. Ca.* 184. But the construction of the rule has not been so strict as that the new proof must not come to the party's knowledge till after the cause has been heard, it is sufficient if it did not come to his knowledge till after publication, or when, by the rules of the court, he could not make use of it. *3 Atk.* 35.

Nor for neglect of evidence.

In a bill of review all things are to be performed according to the former decree that do not extinguish the right, otherwise the non-performance is a good plea in bar, as if writings are to be

In bill of review the former decree must be first performed.

brought into court, or costs paid, but not to release the right, or make a conveyance, because that would destroy the right. 2 *Freem.* 88. *Mitton v. Lord Mansfield.*

Upon filing bill of review plaintiff to pay costs taxed in the former suit, and enter into a recognizance to abide the former decree, in case it should be affirmed.

By the 34th general rule of the court, it is ordered, "that where a bill of review shall be brought, the plaintiff in such bill shall pay the costs taxed or due in the former cause, and enter into a recognizance of such penalty as the court shall appoint to perform the same, in case the same shall be affirmed; and to pay such further costs as this court shall direct, otherwise the defendant is not to be enforced to give any answer to such bill, or incur any contempt for his neglect therein."

New proof of a fact in issue, before the former hearing, no ground for a bill of review.

Where a matter in fact was particularly in issue before the former hearing, though you have new proof of the matter, upon that you shall never have a bill of review; but where a new fact is alledged, that was not at the former hearing, there it may be a ground for a bill of review. 2 *Freem.* 31. *Anon.*

When

When a bill of review is brought for error apparent, the constant method is for the defendant to put in a plea and demurrer, a plea of the decree, and a demurrer against opening the inrollment; so that in effect a bill of review cannot be brought without having the leave of the court in some shape; for if it be for matter apparent in the body of the decree, then, upon the plea and demurrer of the defendant to the bill, the court judges whether there are any grounds for opening the inrollment; if it be for matter coming to the plaintiff's knowledge, after the pronouncing the decree, then, upon a petition for leave to bring a bill of review, the court will judge if there be any foundation for such leave.

2 Atk. 533. *Gould v. Tancred.*

The court would not grant a bill of review after an account had been directed, and taken on a bill of foreclosure, and the report confirmed some years before; and, it appearing, the defendant's agent, attorney, and solicitor, attended the master for him. *Ibid. ut supra.*

In what case the court would not grant a bill of review.

Twenty years a
bar to a bill of
review.

When twenty years have elapsed from the time of pronouncing a decree, and the decree has been signed and inrolled, a bill of review cannot be brought. 1 *Brown Parl. Ca.* 95. 1 *Vern.* 287. 3 *Atk.* 38.

Discovery of a
release or a re-
ceipt, since the
inrollment of
decree, ground
for a bill of
review.

If a decree be obtained and inrolled, so that the cause cannot be reheard upon petition, there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on matters subsequent thereto, as a release or receipt discovered since. 3 *Wms.* 371. *Taylor v. Sharp.*

On discovery of
new evidence,
leave given to
bring a bill of
review.

Upon motion for leave to file a bill of review, upon a recent discovery of new evidence, the court made an order to shew cause why not, on payment of costs to be taxed, as between client and solicitor. *Hilton v. Davies*, 7 Dec. 1750, *in Scac.* On the 12th of February following this order was made absolute. *N. B.* In this bill of review the former decree was repealed.

No new bill
after a bill of
review, nor af-
ter demurrer,
allowed.

No new bill after a bill of review. 2 *Chan. Ca.* 133. Nor can a man bring a bill

a bill of review after a demurrer allowed to a former bill of review. 1 Vern. 441.

Pit v. Lord Arglasse.

A bill having been taken *pro confesso*, a bill of review was brought, and a demurrer having been put in to it was allowed; and now a new bill of review being brought, defendant demurred, and for cause shewed that a bill of review lies not after a bill of review; and the demurrer was allowed. 1 Vern. 135.

Dunny v. Filmore.

Bill of review lies not after a bill of review, demurrer there- to allowed.

If a man hath less decreed for him than he would have, he shall not bring a bill of review. A bill of review lies only for him against whom the decree or dismissal is; ruled on demurrer.

Glover v. Penlington. 2 Freem. 182, *Chan. Ca.* 51.

Bill of review lies only for him against whom the decree or dismissal is.

On arguing a demurrer to a bill of review nothing can be read but what appears on the face of the decree; but after demurrer overruled, the plaintiff may read the bill, answer, or any evidence, as at a rehearing. *Catterall v. Purchase*, T. 1738. 1 Atk. 290.

On arguing a demurrer to a bill of review, nothing can be read but what appears in the decree.

Of Bills in the Nature of Bills of Review.

Bill in nature of
a bill of review,
what.

IF a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same, or a similar interest, relief may be obtained, against error in the decree, by a bill in the nature of a bill of review. Thus if a decree is made against a tenant for life only, a remainder man in tail, or in fee, cannot defeat the proceedings against the tenant for life but by a bill shewing the error in the decree, the incompetency of the tenant for life to sustain the suit, and the accruer of his own interest; and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained.

A bill

A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court. *Mitf. on Plead. 83,*

May be filed
without the
leave of the
court.

of

Of Bills Impeaching on the Ground of Fraud.

Bill to impeach
a decree upon
the ground of
fraud, what.

IF a decree has been obtained by fraud, it may be impeached by original bill without the leave of the court, the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated; and where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be. Besides cases of direct fraud in obtaining a decree, it seems to have been considered, that where a decree has been made against a trustee, the *cestui que* trust not being before the court, and the trust not discovered, or against a person who has made some conveyance or incumbrance not discovered, or where a decree has been made in favour of or against an heir, when the ancestor has in fact disposed, by will, of the subject matter of the suit, the concealment of the trust, or subsequent conveyance, or incum-

incumbrance, or will, in these several cases, ought to be treated as a fraud. It has also been said, that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill. *Mittf. on Plead.* 84.

A bill to set aside a decree for fraud How framed. must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached.

The prayer must necessarily be varied according to the nature of the fraud used, and the extent of its operation in obtaining an improper decision of the court. *Ibid.* 85.

Of

*Of Bills to suspend the Operation
of Decrees on special Circum-
stances, or to avoid them on the
Ground of Matter subsequent.*

The nature of
these bills.

THE operation of a decree signed and inrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. Thus, during the troubles after the death of Charles the First, upon a decree for a foreclosure, in case of non-payment of principal, interest, and costs, due on a mortgage, the mortgagor, at the time of payment, being forced to leave the kingdom to avoid the consequences of his engagements with the royal party; and having requested the mortgagee to sell the estate to the best advantage, and pay himself, which the mortgagee appeared to have acquiesced in, the court, upon a new bill, enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mort-

mortgagor from complying with the strict terms of it; and also made a new decree, on the ground of the matter subsequent to the former decree. *1 Ch. Ca. 61. See also 1 Chan. Ca. 3, and 250. 2 Chan. Ca. 8. Mitf. on Plead. 85.*

Of Bills to carry Decrees into Execution.

The nature of these bills.

By whom exhibited, and under what circumstances.

SOMETIMES, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the farther decree of the court. This happens generally in cases where the parties having neglected to proceed upon the decree, their rights under it become so embarrassed, by a variety of subsequent events, that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party to the original decree, but claims in a similar interest, or is unable to obtain the determination of his own rights till the decree is carried into execution. Or it may be brought by or against a person claiming as assignee of a party to the decree. The court in these cases in general only enforces, and does not vary, the decree; but on circumstances it has sometimes considered the directions, and varied

varied them in case of a mistake; and it has even refused to enforce the decree, though in other cases the court, and the house of Lords, upon an appeal, seem to have considered that the law of the decree ought not to be examined on a bill to carry it into execution. Such a bill may also be brought to carry into execution the judgment of an inferior court of equity, if the jurisdiction of that court is not equal to the purpose, as in the case of a decree in Wales, which the defendant avoided by flying into England; but in this case the court thought itself entitled to examine the justice of the decision, though affirmed in the house of Lords. *Mitf. on Plead.* 86.

May be brought to carry into execution the judgment of an inferior court of equity.

A bill for this purpose is generally partly an original bill, and partly a bill in the nature of an original bill, though not strictly original; and sometimes it is likewise a bill of revivor, or a supplemental bill, or both. The frame of the bill is varied accordingly. *Ibid.* 87.

Of

*Of Original Bills in the Nature of
Bills of Revivor.*

**Of the nature
of these bills.**

WHERE the interest of a party dying is transmitted to another in such a manner that the transmission of it may be litigated in a court of equity, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted; but that such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him; and this benefit is to be obtained by an original bill in nature of a bill of revivor. A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party-deed has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it. The bill is said to be original merely for want of

How framed.

of that privity of title between the party to the former, and the party to the latter, bill, though claiming the same interest as would have permitted the continuance of the suit by bill of revivor. Therefore, when the validity of the alledged transmission of interest is established, the party to the new bill shall be equally bound by, or have advantage of, the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest; and the suit is considered as pending from the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross bill, and every other advantage which would have attended the institution of the suit by the original bill, if it could have been continued by bill of revivor merely. *Misf. on Plead.* 88.

Of Bills in the Nature of Supplemental Bills.

Bill in nature of supplemental bill, what.

IF the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person, not claiming under him, the suit cannot be continued by a bill of revivor, and its defects cannot be supplied by a supplemental bill; but that by an original bill, in the nature of a supplemental bill, the benefit of the former proceedings may be obtained. A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become intitled. It must then shew the ground, upon which the court ought to grant the benefit of the former suit, to or against the person so become intitled; and pray the decree of the court, adapted to the case of the plaintiff, in the new bill.

In what manner this bill is framed.

bill. This bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill which, in its consequences, may draw to itself the advantage of the proceedings on the former bill. *Mistf. on Plead.* 89.

*Of Bills Filed by the Direction of
the Court.*

UPON hearing a cause it sometimes appears, that the suit already instituted is insufficient to bring before the court all matters necessary to intitle it fully to decide upon the rights of all the parties. This frequently happens where persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject matter of the suit. In such a case, if, upon hearing the cause, the difficulty appears, and a cross bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties fully and properly for its decision; and will reserve the directions or declarations which it may be necessary to give or make, touching the matter more fully in litigation, by the former bill, until this new bill be brought to a hearing. 2 *Ch. Ca.* 248. 3 *Atk.* 110. *Mif. on Plead.* 77.

Of

Of Informations.

INFORMATIONS in every respect follow the nature of bills, except in their style. When they concern only the rights of the crown, or of those whose rights the crown takes under its particular protection, they are exhibited in the name of the King's Attorney or Solicitor General as the informant; and these are styled English informations, in contra-distinction to informations in revenue, founded on penal statutes, which were styled Latin informations.

Informations,
what.

By whom exhibited; King's Attorney or Solicitor General

An information, concerning the rights of the Queen, is exhibited also in the name of her Attorney-General.

By the Queen's Attorney-Gen.

If the suit does not immediately concern the rights of the crown, its officers depend on the relation of some person whose name is inserted in the information, and who is termed the relator; and, as the suit is carried on under his direction, he is considered as answerable

By a relator.

to the court, and to the parties, for the propriety of the suit, and the conduct of it. *Mitf. on Plead.* 22.

The death of one relator does not affect the suit, but there must be one to sustain it.

If there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit; but if all the relators die, or if there is but one, and that relator dies, the court will not permit any farther proceeding till an order has been obtained for liberty to insert the name of a new relator; and such name is inserted accordingly, otherwise there would be no person liable to pay the costs of the suit, in case the information should be deemed improper, or for any other reason should be dismissed. 1 *Vez.* 72. 2 *Vez.* 327. *Mitf. on Plead.* 91.

The proceedings upon an information can only abate by the death or determination of the interest of the defendant.

An information by the Attorney General alone not dismissible for want of prosecution; *secus* by a relator.

Nor can an English information, exhibited by the Attorney-General, be dismissed for want of prosecution. It is his privilege to proceed in what way he thinks proper; but an information in his name,

name, by a relator, is subject to be dismissed with costs for want of prosecution, or, according to the language of this court, that the defendant *may go without day*, upon payment of his costs to be taxed.

An English information was brought by the Attorney-General against the defendant for a discovery of the quantity of raisins imported by the defendant, and for payment of the higher duty thereon (he having duly paid the lower duty); the Attorney-General obtained a decree to account, and the debt being liquidated, the defendant was committed to the Fleet for non-payment of it; upon which his brothers paid the debt, and, on application to the court, they were ordered to stand in the place of the crown, and to have the aid of the court to reimburse themselves what they so paid in discharge of the crown's debt.

Mich. T. 1749. Attorney-General v. Chitty, in Scac.

A person paying the debt of the crown, decreed by English information, ordered to stand in the place of the crown, and to have the aid of the court in recovering it.

Of Amending Bills.

AS every species of bill may be amended in the progress of a suit, it will be most convenient to treat of amendments in this place, before we treat of filing, and process thereon.

Amended bill,
what.

Where an original bill is discovered to be imperfect, either in the want of proper parties, or in not stating, with precision, the material facts subsisting at the time of exhibiting it; or if afterwards it shall be found to contain matter not relevant or necessary to the plaintiff's case, the original bill may be amended in any of these particulars, by striking out or adding; and a bill thus amended is styled an amended bill.

Amended bill,
and an original
bill, both form
one record.

An amended bill is considered as a continuation of the original bill, having the same address to the court, and both of them forming one record of the same term. Those who are defendants to the original bill, and continued parties to the

the amended bill, need not be served with fresh process to appear to the amended bill; for having once appeared to the original bill, they are bound to answer the amended bill; but if any new parties are added to the amended bill, they must be served with new process as to an original bill.

The same parties in an amended bill, as were named in the original bill, need not be served with new process.

The record of the original bill is amended by interlining it, where the new matter will come within that compass; but care is to be taken that the record thus amended be made fair and legible; in like manner, if the amendment be by striking out original matter, the same must be done with a pen, and not erased in any other manner; but if the amendments are too large to be interlined in the original record, the bill is new ingrossed and filed with the original bill.

The record amended to be made fair and legible.

Amendments too large for interlineation, bill must be new ingrossed.

If a bill requires to be amended before the defendant appears, it is done without costs; in like manner it may be amended after appearance and before answer, and also after answer, provided no further answer is required. Amendments

In what cases bill may be amended with costs.

ments thus made after appearance are always permitted, upon the terms of the plaintiff's amending the office copies of the several defendants.

In what cases amended on payment of 20s. costs.

But in all cases after appearance, where there is a new ingrossment of the amended bill, the plaintiff must pay 20s. costs to the clerk in court concerned for each defendant, or set of defendants; or if a clerk in court is concerned for two or more solicitors in the same cause, he is in like manner to be paid 20s. costs for each defendant, or set of defendants, so employing different solicitors.

A motion of course to amend a bill.

It is a motion of course to apply to the court for leave to amend a bill in all the ordinary cases above-mentioned; and a copy of the order thus obtained (which is in general terms, not specifying the nature of the amendment) is served by the plaintiff's clerk in court upon the adverse clerk in court, and the original order entered with the register, before the plaintiff can proceed to amend his bill.

As

As the amendments in a bill most frequently arise out of matter disclosed in the answer, a plaintiff may move to amend his bill thereon, on payment of 20s. costs; but in the more ordinary case, if a defendant puts in an insufficient answer, to which exceptions are taken, and they are either submitted to by the defendant, or allowed by the court upon argument, in either of these cases the plaintiff may apply to the court to amend his bill without costs, and that the defendant may answer the exceptions at the same time that he answers the amendments. This is a motion of course, and the court will not suffer a defendant to put in a separate answer to the exceptions, and then another to the amendments.

After answer plaintiff may amend, on payment of 20s. costs.

Exceptions submitted to, or allowed, plaintiff may amend without costs.

In *Coulston v. Richardson*, Bunb. 168, upon arguing exceptions they were allowed; whereupon the plaintiff obtained an order to amend his bill without costs; he amending the defendant's copy; the defendant, without waiting for the amendment, put in a further answer, and then moved to dissolve the injunction, upon the coming in of his second answer:

A defendant, without waiting for the amendment, puts in a second answer, is irregular.

but

but it was moved for the plaintiff that this answer came irregularly before he had amended his bill, and it appeared (although delay on the plaintiff's side was suggested) that the plaintiff offered to amend his (the defendant's) copy; and the court thought the most proper method in this case was, for the plaintiff to take exceptions to the second answer, and to turn the whole amendments into exceptions; and the order for shewing cause why the injunction should not be dissolved was enlarged.

But by the present practice of the court, when a plaintiff hath obtained this order to amend, upon a submission to, or an allowance of, the exceptions, it is understood he is not to give a defendant any unnecessary delay in acting under it, especially in injunction causes; and therefore if a plaintiff is not, by his order to amend his bill, limited to amend it within a reasonable time (i. e. a week, or ten days), the defendant may give him a notice of motion to discharge the order to amend, unless he files his amended bill within a week; and in common cases the court limits the plaintiff to

to file his amended bill within that time, or that the order for amending it be discharged.

If the plaintiff is advised to strike the name of a defendant out of the bill, after he has appeared and copied it, he must obtain an order to amend in that particular, upon payment of costs to be taxed. So where a defendant disclaims by his answer, or does not appear sufficiently interested in the plaintiff's case to continue any longer a party, or if the plaintiff wants his testimony as a witness, and for any of these reasons strikes his name out of the bill, the motion must be to amend the bill, and that, as against the defendant, it may be dismissed with costs to be taxed.

A defendant having appeared to, copied, or answered, the bill, and after struck out as a party, must be paid his costs to be taxed.

Although it is a matter of course to strike out of the bill the name of a co-defendant, the practice is very different as it respects a co-plaintiff. The court will not suffer his name to be struck out of the bill without sufficient cause, as it tends to lessen the defendant's security for his costs, which may eventually be decreed to him.

A plaintiff not to be struck out of a bill without the special order of the court.

By

Plaintiff in an original cause has a right to an answer before he answers the cross bill, but if he amends his original bill he loses his priority.

By the course of the court, the plaintiff in a cross cause cannot have an answer till he himself has answered the original bill; but this is a privilege the plaintiff in the original bill has in right of his original bill; for if, after the cross bill be filed, he will amend the original bill in material parts, he will not be intitled to have an answer to the amendments; for as the bill may be amended both in discovery and relief, the pendency of suit, as to those parts which are amended, is only from the time of the amendment; for by amending the original bill, after a cross bill filed, the plaintiff in the original bill has lost his priority of suit. 2 *Atk.* 219. *Long v. Burton.*

Demurrer to part of a bill, plaintiff may amend, on payment of 20s. costs.

Where a demurrer is filed to part of a bill, and it is either submitted to by the plaintiff, or allowed by the court upon argument, it is a motion of course to amend the bill, upon payment of 20s. costs.

Original bill amended, by charging matters which arose after filing it, viz.

The bill charged, by way of amendment, matters which arose after filing the bill, viz. that plaintiff had taken out

out letters of administration; and although it was pleaded that this was matter proper in a supplemental bill, yet the plea was overruled, for that such matters may be charged either by way of supplement or amended bill. *Humphreys v. Humphreys.* 3 Wms. 351.

viz. that plaintiff had taken out letters of administration, may be either by amendment or supplement.

After publication has passed, and the cause set down to be heard, the bill may be amended; but in no other respect than by making parties, for no new charge can be introduced, or a material fact put in issue, which was not so in the cause before, but a supplemental bill should be preferred. *Goodwin v. Goodwin.* 3 Atk. 370.

After publication no amendment can be made but adding parties.

But if no witness has been examined, an amendment has been permitted after publication passed. *Hastings v. Gregory,* 19th Nov. 1782, in Scac.

Otherwise if no witness has been examined.

After a replication a plaintiff may amend his bill, and for that purpose it is a motion of course to withdraw his replication, and amend his bill, upon payment of the usual costs, which are 13s. 11d. for withdrawing the replication, and 20s. costs for amending the bill.

Plaintiff may amend after replication, by an order to withdraw it.

But

After an order to dismiss, and a replication to retain, the bill, plaintiff cannot amend without shewing that the amendment is material.

But after a defendant has obtained an order to dismiss the bill for want of prosecution, unless cause, and to retain it, the plaintiff files a replication, and afterwards finds it necessary to amend his bill, he cannot in this case, after being thus dilatory, move of course to withdraw his replication, and amend his bill, on payment of the usual costs; but he must give notice of this motion, and state to the court the materiality of the amendment, before he can be permitted to amend.

Bill ordered to be amended at the hearing.

If the addition of parties only is wanted, an order is usually made for the cause to stand over, with liberty to amend the bill, by adding the proper parties; and in some cases where a matter has not been put in issue by a bill, with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill for the purpose of making the necessary alteration.

Mitf. on Plead. 260. 2 Brown Parl. Ca. 194.

Filing

Filing of Bills.

ANY party who institutes a suit, by means of any bill in equity, must sue out a writ of *subpæna* to bring the adverse party into court; and if the *subpæna* be made returnable immediately, the bill is required to be filed before the writ issues * (except upon bills for an injunction to stay waste, or proceedings at law commenced, or threatened to be commenced †); and, upon a *subpæna* returnable on a day certain, the bill must be filed within two days after the day of the return, and all others on common returns are to be filed within four days after such return; and if the defendants do appear, according to the respective

The time of
filing original
bills.

* By the 3d general rule of the court.

† By the statute of 4 Ann. ch. 16, § 22, it is enacted, "That no *subpæna*, or any other process for appearance, do issue out of any court of equity till after the bill is filed with the proper officer in the respective courts of equity, except in cases of injunctions to stay waste, or suits at law commenced."

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K

returns

returns, and the bill be not exhibited accordingly, then the defendant is to be dismissed with 1*l.* 6*s.* 8*d.* costs.

If there be a
dismissal for
several defen-
dants appearing
by one solicitor,
only one sum of
1*l.* 6*s.* 8*d.* costs
is to be paid,
but otherwise
if they appear
by several soli-
citors.

If there be a dismissal for several defendants, the plaintiff is to pay only one sum of 1*l.* 6*s.* 8*d.* costs, provided they all appear by one solicitor, otherwise the clerk in court, for each solicitor, must be paid 1*l.* 6*s.* 8*d.* costs, in respect of those defendants for whom they appear.

The manner of
filing them.

These bills are filed of the term in which the process issues, or is retted; they are signed at the head by one of the sworn clerks, who writes the term, the day on which it is filed, and the county thereon; and, after obtaining a *fiat* from the Chief Baron, or one of the Barons, at the foot of the bill, for issuing the process (which is a matter of course), the bill is then entered in the bill book, under the head of that county, where either the parties dwell, or the property to which the subject matter of the bill relates, appears to be situated.

Process

Process by Subpœna requiring an Appearance.

THE *subpœna* is the first process *Subpœna*, what. which issues out of this court in order to bring in the party to appear to answer the petitioner's bill. It issues under the seal of the court (which is always open), requiring the person complained of in the bill, either immediately, or at a certain day, to appear in court and answer such matters as shall be objected against him by the party complaining, under the penalty of 100*l.*; which words are only inserted *in terrorem*, the penalty being never levied.

Previous to the issuing of this writ, a memorandum, or what is commonly called a warrant to sue, must be filed with the clerk in court, who makes out the writ as directed by the *Stat. 25 Geo. 3. c. 80.*

Memorandum
or warrant re-
quired by Stat.
25 Geo. 3.

Form of the
memorandum,
or warrant to
sue.

In the court of Exchequer.
(Middlesex to wit.) A. B. is retained
to prosecute by G. D. as his solicitor,
against E. F.

A. B. plaintiff's solicitor.

(But if by an agent to the
solicitor immediately retained,
add)

by G. H. his agent.

Filed of record this day

of in the

year of the reign of King

George the 3d

Fowler.

A new memo-
randum or war-
rant not neces-
sary to issue pro-
cess against a
defendant added
to the original
bill, by an order
to amend it.

But if a defendant is added to the bill,
by any rule or order of the court, after
the commencement of the suit, a new
memorandum is not necessary to sue out
the usual process against a defendant so
added, but the solicitor must specify in
the *precipe*, that the defendant named
therein has been added thereto by rule
or order. Sec. 24.

George,

George, &c. Greeting, we command and strictly injoin you, that (all excuses apart) you appear before the Barons of our Exchequer, at Westminster, on the day of next (or immediately after the receipt of this our writ), to answer us concerning certain articles then and there, on our behalf, to be objected against you; and this in no wise omit, under the penalty of 100*l.* which we shall cause to be levied upon your goods and chattels, lands and tenements, to our use, if you neglect this our present command. Witness the Right Honourable Sir Archibald Macdonald, Kt. at Westminster, the day of in the year of our reign.

Form of the writ of *subpoena*.

By the Barons,

Eliot.

At the suit of *A. B.* by bill.

Indorsement thereon.

Fowler.

Where there are many plaintiffs they need not all be named on the back of the *subpoena*, or in the label thereto, but only *A. B.* and others, since this is sufficient notice for the defendant to appear;

The names of all the plaintiffs need not be indorsed on the *subpoena*.

for the appearance to *A. B.* and others will be an appearance to the rest.

No more than four defendants to be inserted in a *subpœna*.

No more than four defendants can be inserted in a *subpœna*, in which number a man and his wife are only considered as one defendant; and if there are two or more defendants, the following label, containing the name of each defendant, may be annexed to the writ, and served upon him.

Form of the label annexed.

To *A. B.* returnable in the court of Exchequer, at Westminster, on the day of next (or immediately after the receipt hereof), at the suit of *C. D.* by bill,

King's Remembrancer's Office. F.

A short entry of the writ made in a public book, called the *subpœna* book.

After the writ is so made out, a short entry is made of the names of the parties in a public book called the *subpœna* book, with the name of the sworn clerk from whom, or in whose division, the writ issues.

Subpœna, its returns.

The return of this *subpœna* is either ordinary or extraordinary.

1. Or-

1. Ordinary, as it respects a day certain, or one of the common returns,

1. Ordinary.

2. Extraordinary, when it is made returnable immediately; and although the general rule of the court provides that a *subpoena* may be made returnable on one of the common returns, yet these returns, as applicable to this writ, are now out of use; and the only returns at present in practice upon it, are either those upon a day certain, or immediately, as the place of the residence of the party to be served therewith makes it necessary.

2. Extraordinary.

Where a defendant resides in London, or within five miles thereof, a *subpoena* may issue against him returnable immediately, provided the same issues within the term, or a limited time after it; for a *subpoena* returnable immediately cannot issue in a vacation, except from the last day of every term until the end of the sittings after such term; in which case, by a general order of court, made the 27th of November 1721, the clerks are empowered to make process of *subpoena* returnable immediately, upon any bill,

Return of *subpoena* depends upon the residence of the defendant.

Or between the last day of the term, and the end of the sittings.

Upon an affidavit of the party's residing in London, or within 5 miles thereof.

And where a subpoena is issued, it may be served upon the party, or upon any other person residing in London, or within 5 miles thereof, who is known to be at the place where the party resides.

Affidavit of residence not necessary where the subpoena issues in term.

Manner of serving a subpoena.

against any person residing in London, or within five miles thereof, a proper affidavit being filed of such residence, and, in default of such person's appearing on such process, within the time already prescribed by the rules of this court, an attachment may issue, returnable the first return of the succeeding term.

But where a subpoena issues, returnable immediately within the term, an affidavit of the defendant's residing in London, or within five miles thereof, is not required as in the case of its issuing between the last day of the term and the end of the sittings.

If a subpoena issues against one defendant only, the original writ, or a true copy of it, may be served either personally upon the party, or by leaving the same with one of his family at the place of his abode; if a copy of the writ is served, the original must be shown at the same time to the person upon whom it is served; but if it issues against more than one defendant, then a label annexed to the subpoena, or a copy of such subpoena, may, in like manner be served upon

upon each defendant, shewing at the same time the original writ under the seal of the court.

Upon an affidavit of the party residing in London, or within 2 miles thereof.

A defendant may be served personally any where within the jurisdiction of the court; but if he cannot be served personally, a copy of the writ, or a label annexed to it, must be served at the last place of his abode, in the manner before directed; and this writ may be served at any time of the day on which it is returnable.

A defendant may be personally served any where within the jurisdiction of the court.

Affidavit of residence not necessary where the defendant resides in town.

In the Exchequer.

(Title of the cause.)

I, **Ro of** in the county of **maketh oath and faith, that** **he, this deponent, did, on the** **day of** **last, personally serve** **the above-named defendant with a writ** **of** **issuing our, and under** **the seal, of this honourable court,** **by delivering to the said defendant, a** **true copy of the said writ, and at the** **same time shewing to the said defend-** **ant the said original subpoena, or by** **delivering to, and leaving with, a per-** **son**

Affidavit of service of a subpoena.

"son who said she was a maid servant be-
 "longing to the family of the said defen-
 "dant, at the house of the said defendant,
 "situate in the parish of
 "in the county of and at the
 "same time shewing to such maid servant
 "the said original writ, whereby the said
 "defendant was commanded to appear
 "in this honourable court the
 "day of last (or immediately,
 "as the case may be)."

Affidavit to be
 sworn before a
 baron or com-
 missioner.

This affidavit is either to be sworn
 before a Baron, or a Commissioner of the
 court in the country.

Subpœna against
 husband and
 wife, service
 upon one, good
 upon both.

If the subpœna be against husband and
 wife, and either the husband or wife
 alone be served, it is good service upon
 the other, because they are considered as
 the same person in law, and their prop-
 erty is the same, and therefore if one
 only be served, it is presumed to
 be sufficient notice to the other; and,
 for want of an appearance for the wife,
 an attachment may issue against both the
 husband and wife, inasmuch as it is a
 contempt in both; but for this contum-
 acy in the wife, the husband is alone

to

to be attached, it being incumbent upon him to order an appearance to be entered for his wife. The attachment must be indorsed for want of an appearance in the wife.

But when a bill was filed in this court against husband and wife, the husband being abroad, and the wife refusing to appear without the husband, upon an affidavit of service on her, and that the matter in question was the estate of the wife, the court ordered an attachment against her. *Tugwell v. Boughton*, 18th Dec. 1788, in *Scac.*

Subpæna against husband and wife, the husband being abroad, and the estate in question being the wife's, an attachment ordered against her.

N. B. On motion the following day, upon an affidavit that the husband absconded to avoid being served with the process of the court, the husband was ordered to appear on the first day of the next term pursuant to the statute. *Tugwell v. Boughton*, 19th Dec. 1788, in *Scac.*

Amere amaret, but dachur, with service, don one good upon post.

The leaving a *subpæna*, to appear and answer, at the lodgings of a defendant who was not to be found, was deemed not good service, though an order was ob-

Subpæna left at the lodgings of a defendant who had left them a year before, deemed not good service.

obtained for that purpose, it appearing afterwards that the defendant had left his lodgings above a year before the subpoena was served. 22 Veru. 369.

Where a party does not abscond to avoid being served with process, but that he cannot be found so as to be served there-with, court will order, that service at his last place of abode shall be good.

But where a party does not abscond to avoid being served with process of Subpoena, and it shall appear by affidavit that due diligence hath been used to serve him, but without effect, the court will order, that service of a Subpoena at his last place of abode shall be good service upon him.

free from mistakes; and that the affidavit of service be full and correct; for if there be error in the Subpoena, either in the christian name or surname of the parties described in the bill, or if it be made returnable on a day now, or if the affidavit is not duly made in this court from whence the process issued, or fails to state with precision the manner of service, conformable to the rules of the court, no compulsory process against a party to circumstanced can avail; on the contrary, where the Subpoena regularly issues, and is duly served upon the party, the clerks in court are empowered, ex

For want of appearance.

Process to issue an attachment against him for his contempt.

obtained for that purpose, it appearing
afterwards that the defendant had left his
~~Process by Attachment to compel Ap-~~
~~pearance and Answer.~~

BEFORE a defendant can be deemed
in contempt for not appearing to a
subpæna, or before an attachment can
regularly issue against him for that con-
tempt, two things are necessary to be
ascertained; namely, 1st, that the *sub-*
pæna which issued against him should be
free from mistakes; 2dly, that the affi-
davit of service be full and correct; for
if there be error in the *subpæna*, either
in the christian name or surname of the
parties described in the bill, or if it be
made returnable on a *dies non*, or if the
affidavit is not duly made in this court
from whence the process issued, or fails
to state with precision the manner of
service, conformable to the rules of the
court, no compulsory process against a
party so circumstanced can avail; on the
contrary, where the *subpæna* regularly
issues, and is duly served upon the party,
the clerks in court are empowered, *ex*
officio, to issue an attachment against him
for his contempt.

Where a party
does not appear
how and where
it may be served
cells, but that
he cannot be
found to as to
be served there-
with, court will
order, that let
vice at his last
place of abode
shall be good.

For want of an
appearance.

So

For want of an
answer.

So if a defendant appears, but does not answer, within the time limited by the general rule of the court, or by the subsequent orders of the court granted for that purpose, an attachment may issue.

The form of
the attachment.

George, &c. To the sheriffs of the city of London; greeting, we command you that you omit not by reason of any liberty, but enter the same and attach *A. B. C.* and *D.* by their bodies, where-soever you shall find them in your bailiwick, and them safely and securely keep, so that you may have them before the Barons of our Exchequer, at Westminster, on the day of next,

shall to County of

to County of

to answer us concerning divers trespasses, contempts, and offences, by them lately done and committed; and that you then have there this writ. Witness &c. at Westminster, the day of in the year of our reign, by affidavit, and by the Barons.

If for want of
an answer, by
rule of court.

Indorsement
thereon.

At the suit of *J. S.* for not appearing.

Fowler.

At

At the suit of J. W. for not answering.

Indorsed thus:
if for not an-
swering.

In attachments, and all other writs, regard is to be had to the peculiar jurisdic-
tion and privilege of certain counties and places into which they issue, as the

counties palatine of Lancaster, Durham, and Chester; the Cinque Ports; the town of Berwick upon Tweed; cities and towns which have sheriffs by whom the writs can be executed; warden of the Fleet; and marshal of the Marshalsea. If the writ is to be executed within the counties palatine of Lancaster and Chester, the form to be as follows:

Chancellor of our county palatine of Lancaster,

County of Lancaster.

To the Chamberlain of our county palatine of Chester,

County of Chester.

or to your deputy there; greeting, we command you, that by our writ, duly to be issued under the seal of our said county palatine, you do command the sheriff of the said county that he do not omit, &c. lately done and committed, and what the said sheriff shall do in the premises, that he do certify you thereof before the said. (*day of the return*), so that
you

This head and conclusion are proper for any other writ into these counties.

you have the said certificate before our said Barons at the said day and place, together with the name of the said sheriff and this writ. Witness, &c.

Attachment into Durham.

George, &c. To the Rt. Rev. Father in God, by divine providence Bp. of Durham, or to your substitute there; greeting, we command, &c. under the seal of your bishoprick, &c. sheriff of the said county palatine of Durham, that he do not omit, &c. (as before to the counties palatine of Lancaster and Chester).

Attachment into Durham when the see is vacant.

George, &c. To the Chancellor of our county palatine of Durham (the bishoprick being vacant), or to your substitute; greeting, &c. as before.

Attachment to the Cinque Ports.

George, &c. To the Constable of our castle at Dover, and Warden of the Cinque Ports, or to your deputies; greeting, &c.

Attachment into Berwick upon Tweed.

George, &c. To the Mayor and Bailiffs of our town of Berwick upon Tweed; greeting, &c.

George

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George the third, &c. To the Warden of our prison of the Fleet, or to his deputy, greeting, we command you that you omit not for any liberty, but that you enter the same, and attach *F. G.* whom we are informed is now in your custody, and *Richard Roe*, by their bodies where-soever you shall find them in your bailiwick, and them safely and securely keep, so that you may have their bodies before the Barons of our Exchequer, at Westminster, on the *Sixth* day of *February* next, to answer us concerning divers trespasses, contempts, and offences, by them lately done and committed, and that you have there then this writ. Witness, the Right Hon. Sir *Archibald Macdonald*, Kt. at Westminster, the *Thirty-first* day of *January*, in the *Thirty-fifth* year of our reign. By affidavit, and by the Barons.

Attachment of
detainer to the
Warden of the
Fleet.

Eliot.

At the suit of *James Johnston*, for Indorsed.
want of an appearance.

Fowler.

By virtue of this writ to me directed, I have attached the body of the within
VOL. I. L named

Return thereon.

named *F. G. Esq.* and detained him in custody, as by the said writ I am commanded.

The answer of *John Eyles, Esq.*
Warden.

Proceedings
thereon.

Upon the above return, the court is moved for a writ of *habeas corpus*, directed to the *Warden of the Fleet*, to bring up the defendant, either upon a motion-day during the term, or on any day during the sittings of the court after the term, to be charged with the bill the first time; and if he should refuse to appear, the court may appoint a clerk in court to appear for him, pursuant to the *Stat. 5 Geo. 2. ch. 25.* (*See proceedings to take a bill pro confesso.*)

Attachment of
detainer to the
Marshal of the
Marshalsea.

George, &c. To the Marshal of the Marshalsea of our court of King's Bench, or to your deputy there; greeting, &c.

By the King's
demise process
of contempt de-
termines, unless
a *capi corpus* be
returned there-
on.

By the King's demise all process of contempt not executed is determined, so that you must begin again at an attachment; but where process is executed, and a *capi corpus* returned, then the process stands good. *Vern. 300. c. 295.*

No

No more than four defendants can be inserted in an attachment, which must be tested and made returnable in term time.

Four defendants can only be inserted in an attachment.

If an attachment issues in a vacation, the day on which it issues must be marked on the back of it.

By the 6th general rule of the court, it is ordered, that there be in all process of contempt, in London and Middlesex, and within 15 miles thereof, six days, and in all other counties within 60 miles of London, fifteen days, between the teste and return of each process, unless the court shall order process returnable *immediate*; and in any case where a sheriff shall return a *cæpi corpus* upon process of contempt, after a rule of four days given to bring in the body, and the body not brought in, then upon motion a messenger is to go and bring in such defendant.

Limitation of return to process of contempt.

In proceeding to a sequestration, or to take a bill *pro confesso*, care must be taken that attachments, and all other processes of contempt, do issue into the

Process of contempt to issue into the county where the defendant resides.

county where the defendant usually resides; and where defendants live within 15 miles of London, there must be six clear days between the teste and the return of each process of contempt. If the defendants live above 15 miles, and within 60 miles of London, there must be ten clear days; and above 60 miles, fifteen clear days; and Sunday is one of the said days.

Sunday is one of the days within the return of process of contempt.

Attachment for want of an appearance bailable.

This writ may be directed to the sheriff of any county, city, or town, where the defendant happens to reside, or can be found, so as to arrest him upon it. It is aailable writ, and the usual returns made upon it are, either a *cepi corpus*, or a *non est inventus*. If the party arrested cannot procure bail, but is detained in prison for want of it, he must first enter his appearance, and pay 10s. costs of contempt, before he can be discharged out of custody by a *superseas*.

Usual returns thereon.

10s. costs to be paid for want of an appearance.

After a *cepi corpus* returned, it is deemed oppressive to sue upon bail-bond, and move for a messenger at the same time.

After a *cepi corpus* is returned by the sheriff, it is deemed oppressive in a plaintiff to put the bail-bond in suit, and to apply to the court for a messenger at the same time.

Where

Where a *cæpi corpus* is returned upon an attachment, the following rule is given: Rule given upon a *cæpi corpus*.

Wednesday, the 11th day of *May*, 1795.

Unless the sheriff of the county of Form of the rule.
do bring in the body of *A. B.*
in the annexed writ named, on or before
Monday next, the 16th day of *May* inst.
let him be amerced 40s.

By the court.

Fowler.

L 3

Process

*Process by Messenger to compel
Appearance and Answer.*

After expiration of 4 days a messenger to go for the defendant;

UPON the expiration of the foregoing rule, the court is moved for a messenger, which, upon reading the attachment and return, and the rule thereto annexed, is granted of course.

Who cannot discharge him till an appearance is entered, and costs paid.

If the defendant is taken into custody by a messenger, he cannot be discharged till he has entered his appearance, and paid the costs of his contempt.

Costs to be paid.

The costs to be paid hereon are stated costs, so far as respects the issuing the attachment, for which 10s. is payable for each defendant; but the costs of the rule upon the sheriff, and moving the court for the messenger and his fees, are costs subject to be taxed.

Messenger's fees.

The messenger of the court is entitled to 6s. 8d. a day, from the day on which he receives the order, and then to 13s. 4d. a day,

a day, from the day on which he takes the party into his custody, up to the time of his enlargement, besides his travelling charges, and other expences incidental to the arrest, and 1*l.* 13*s.* 4*d.* for his caption fee.

It seldom happens that a defendant, who is arrested upon an attachment for want of an appearance, is hardy enough to stand out so long in contempt as to make it necessary to apply to the court for a messenger; the more frequent case is for him to appear to the *subpæna*, and pay 10*s.* costs of the attachment.

THE attachment with proclamations is a process issuing out of this court upon the return of a *non est inventus*, on the preceding process of attachment, commanding the party to appear in this court, *sub pena ligeancia*.

George, &c. To the sheriff of our county of _____ greeting, we command you that you omit not, by reason of any liberty, but enter the same, and make public proclamation in such places in your bailiwick as you shall think most convenient, that *A. B.* do, on pain of his allegiance which he oweth to us, personally appear before the Barons of our Exchequer, at Westminster, on the _____ day of _____ next; and in the mean time omit not, by reason of any liberty, but that you enter the same, and attach the said *A. B.* by his body wherever he shall be found within your baili.

bailiwick, and that you keep him safely and securely, so that you have his body before the Barons of our Exchequer, at Westminster, on the day of next, to answer us touching divers trespasses, contempts, and offences, by him lately done and committed, and that you then have there this writ. Witness, &c. at Westminster, the day of in the year of our reign. By writ returned, and by the Barons.

Eliot.

To be indorsed as the attachment.

Indorsement
thereon.

If a defendant appears, and pays 20s. costs, as required by the 6th general rule of the court, he thereby clears his contempt; but if the sheriff returns a *non est inventus* upon this writ, then a commission of rebellion issues of course, directed to certain commissioners therein named; the proceedings on which are treated of in the next general head of process to compel an appearance and answer by a commission of rebellion.

Party appearing or answering, and paying 20s. costs, discharges his contempt.

This writ is alsoailable by the party attached, in like manner as upon an attach-

Manner of executing this writ.

attachment for not appearing or answering; and the sheriff, in the execution of attachments, cannot break into a man's house to arrest him, according to the authority of *Semaine's case*, 5 Coke, 91.

Reasons why, on a contempt, the sheriff cannot break open doors, or enter freeholds.

1. Because the very notion of *liberum tenementum* is, that the tenement should be freed by the law from all actual violence; for that cannot be said to be held freely, if the lord that had a right to distrain, or the sheriff that was to serve the ordinary process, had a power to enter by force; and if the lord was not permitted to enter with actual violence where he had a right to his rent, the sheriff could not be allowed to enter by force to serve the ordinary process.

2. Because, in the time when the tenures were in their full height, it was thought too severe that the lords, who had generally demands on their tenants, should break in upon their tenants, since the violence of such a process, in the first instance, might compel them to pay more than was due. *Lord Ch. B. Gilbert's MS. Treatise of the Original of the Court of Chancery.*

3. Because

3. Because the party might be ready and willing to answer the demand, and therefore it is too severe to extort that by violence which it doth not appear but the party is ready to pay. *Ibidem.*

If after an arrest upon an attachment, and a *capi corpus* returned, the defendant escapes out of the kingdom, a serjeant at arms shall be granted, and upon return a sequestration. 1 *Vern.* 344.

Defendant escaping out of the kingdom after a *capi corpus* returned, a Serjeant at Arms shall go, and then a sequestration.

Where the return of an attachment or other process is suffered to expire, and nothing is done upon it, and a new attachment is made, and the party arrested upon it, the plaintiff will only be intitled to the costs of one writ.

Attachment renewed, plaintiff only intitled to the costs of one writ.

If a sheriff neglects or refuses to return an attachment or other process directed to him, he may be ruled to return the writ in a week after the service of such rule (which is always put under seal), and, upon an affidavit of service, the court will order an attachment against him.

A sheriff neglecting to return an attachment, must be ruled so to do, and upon refusal he will be attached.

(Date

Form of the
rule.

(Date of the rule.)

(Title of the cause.)

By bill.

It is this day ordered by the court,
that *R. B.* Esq. sheriff of the county of
or his under-sheriff, do, in a
week after the service of this rule, or a
true copy thereof, return into this court
the writ of attachment issued in this cause
against the above-named
returnable the day of
last, for (*not appearing to, or answering*)
the plaintiff's bill.

By the court.

Fowler.

Where a sheriff
is attached, the
coroner must
execute the
writ.

Where a sheriff is ordered to be at-
tached, the writ of attachment must be
directed to the coroner of the county,
for him to execute it.

Proceedings in
courts of equity
not abated or
discontinued by
the demise of
the crown.

By *Stat. 1 Ann. c. 8, § 5*, it is enacted,
that no proceedings in any court of equity
shall be determined, abated, or discon-
tinued, by the demise of any King or
Queen of this realm.

Process

*Process by a Commission of Rebellion
to compel Appearance and Answer.*

A Commission of rebellion is a writ Commission of rebellion, what.
issuing out and under the seal of this court upon the return of a *non est inventus*, on an attachment with proclamations. It issues of course, and may be directed to two, three, or four commissioners therein named at the discretion of the plaintiff, commanding them jointly and severally to "attach the defendant "wherever he shall be found in the kingdom of England, dominion of Wales, "or the town of Berwick upon Tweed, "as a rebel and contemner of our "laws, &c."

The commissioners are authorized to In what manner executed;
take the defendant wheresoever they shall find him, and that within a privileged place, as within the verge of the court within a privileged place,
of the palace at Westminster, and upon and upon a Sunday.
a Sunday. *Arg. 1 Atk. 57.*

It

May break open
the house of a
party, or that
of another.

It is said the commissioners may break open the house of the party, or even the house of another. 2 *Px. Alm.* 75. *Prac. Reg.* 95.

And may take
bail to appear
or answer;

Where a commission of rebellion issues upon mesne process, for want of an appearance or answer, the commissioners may admit the defendant to bail, and take a bond from him to appear; but where it is upon an attachment for a contempt of an order of the court, &c. there the commissioners ought not to take any security, but to have the body in court at the day of the return of the commission of rebellion. *Jones v. Clement.* *Bunb.* 50.

In a commission
of rebellion, for
want of an an-
swer, commis-
sioners refused
bail, but carried
the defendant to
goal; ordered to
attend the court
with their pri-
soner.

In a commission of rebellion which issued out of this court, for want of an answer, the commissioners attached the defendant, who offered to give bail, but they refused it, and took him to Maidstone goal. Mr. Sawyer now moved for the defendant to be discharged out of goal, and admitted to bail, for that the commissioners had exceeded their power; and the court ordered, that they, or any two of them, should, on service of that order,

order, under seal of the court, attend the court with their prisoner upon the Wednesday following. *Powel v. Watts*, 26 Jan. Hil. 28 & 29, ch. 2. *Liber Ordin. in Scac.*

If the defendant be taken in or near London, during the term, or the sittings of the court after it, the commissioners must bring him into court, from whence he will stand committed to the Fleet, till he appears and pays 2*l.* 13*s.* 4*d.* costs of his contempt.

Party taken in or near London, during term or sittings, must be brought to the bar and committed.

But if the defendant be taken in the country, the commissioners may, at their election, either bring him into court without delay, or take bond, with good security, in the penalty of 100*l.* with condition for his appearance, &c. 1 ch. R. 26*r.* 2. *Prac. Reg.* 95. And the commissioners may take such security, in their own names, upon the following condition:

If taken in the country, the commissioners may, at their election, bring him into court, or take good bail for his appearance, &c. in their names.

“ The condition of this obligation is
 “ such, that if the above bounden *A. B.*
 “ shall and do personally appear before
 “ our sovereign lord the King, in his
 “ Ma-

Form of the condition of the bond.

“ Majesty’s court of Exchequer at West-
 “ minster (*insert the day on which the*
 “ *process is returnable*), upon a commis-
 “ sion of rebellion issued out of the said
 “ court against him, at the suit of C. D.
 “ and shall answer as well for his said
 “ contempt as for all such things as shall
 “ be then and there objected against him,
 “ and do and perform what the said
 “ court shall award or order in that be-
 “ half, then the present obligation to be
 “ void, or else to remain in full force
 “ and virtue.”

Return of the
commissioners.

If they refuse
to make it,

the court will
commit them
for a contempt.

Form of the
commission of
rebellion.

The return of this process may be
 made by *one, two, or more* of the com-
 missioners acting under it; and if they
 refuse or neglect to make a return of it
 to the court, upon motion they will be
 ordered so to do within a week after
 personal service of the order under seal;
 and if they should disobey it, upon an
 affidavit of service, the court will com-
 mit them for their contempt.

“ George, &c. To A. B. C. D. E. F.
 “ and G. H. Whereas J. S. to whom
 “ by public proclamations made on our
 “ behalf by the sheriff of our county
 “ of

“ of in several places within
“ the said county, it was commanded
“ that he the said J. S. should, on pain
“ of his allegiance which he oweth to
“ us, personally appear before the Barons
“ of our Exchequer, at Westminster, at
“ a day now past, which command of
“ ours he hath nevertheless manifestly
“ refused to perform; therefore, we
“ command you, and every one of you,
“ jointly and severally, that you omit
“ not, by reason of any liberty, but
“ enter the same; and that you, or any
“ one of you, do attach, or cause to
“ be attached, the said J. S. as a rebel
“ and contemner of our laws, wherefo-
“ ever he shall be found in our kingdom
“ of England, the dominion of Wales,
“ or the town of Berwick upon Tweed,
“ so that you, or any one of you, have,
“ or cause his body to be had before the
“ Barons of our said Exchequer at West-
“ minster, on the day of
“ next, then and there to answer us
“ touching such things as shall be ob-
“ jected against him; and further, to
“ do and receive in the premises what
“ our said court shall order in that be-
“ half. And we do also, by these pre-
VOL. I. M “ sents,

“sents, strictly command all and every
 “of our mayors, sheriffs, bailiffs, con-
 “stables, and other our officers, mini-
 “sters, and subjects whatsoever, that
 “they shall, at their peril, be aiding
 “and assisting to you, and every one of
 “you, in the execution of these pre-
 “sents. In witness whereof we have
 “caused these our letters to be made
 “patent. Witness, &c. By the Re-
 “membrance-roll, and by the Barons.”

Eliot.

Indorsement
 thereon.

At the suit of J. T. for want of an
appearance or answer.

Fowler.

Power of the
 commissioners
 to call assistance.

The commissioners have power, by
 their commission, to call to their as-
 sistance any person or peace-officer to
 assist them in taking the party in con-
 tempt; and therefore if the commissio-
 ners, after having attached the defen-
 dant, shall permit him to escape, they
 may be committed till they produce him.

If they permit
 the defendant to
 escape, they
 must stand
 committed till
 they produce
 him.

Prac. Reg. 95.

Rescuers to
 stand com-
 mitted.

So if the defendant be rescued, the
 rescuers may stand committed. *Prac.*
Reg. 95.

But

But if the defendant appears or answers, and pays 2*l.* 13*s.* 4*d.* to the plaintiff's clerk in court, which are the stated costs imposed on this process by the 6th general rule of the court, the defendant thereby clears his contempt; if not, a serjeant at arms may be moved for upon a *non est inventus*, returned on a commission of rebellion.

Costs of contempt on commission of rebellion.

M 2

Process

Process by a Serjeant at Arms to compel Appearance and Answer.

Serjeant at Arms, his office.

THE Serjeant at Arms is an antient officer of this court, who is daily attending thereon to execute its commands, either by himself or his sufficient deputy. He takes persons into custody who refuse or neglect to obey the orders or decrees of the court, or its mesne process. This officer is applied for to the court on the return of a *non est inventus*, upon a commission of rebellion, and an order is obtained of course for him, upon reading this writ and its return.

(Date of the order.)

(Title of the cause.)

By bill.

Order for a serjeant at arms on the return of a commission of rebellion.

Upon the motion of Mr. of counsel, on behalf of the plaintiff, informing the court that the said defendant had incurred the contempt of this court in

in not appearing to the plaintiff's bill; and that a commission of rebellion had lately issued under the seal of this court, directed to certain commissioners therein named, commanding them to attach the said defendant as a rebel and contemner of the law, and to have him before the Barons of this court on the 12th day of *February* last. Whereupon two of the said commissioners had returned the said commission into this court, and had thereon certified, that they had endeavoured to attach the said defendant, but had not been able to find him.—It was therefore prayed, that the serjeant at arms attending the Right Hon. the Lords Commissioners of his Majesty's treasury, may forthwith make diligent search and inquiry after the said defendant, and bring him before the Barons of this court to answer his said contempt.—Whereupon, and on reading the said commission of rebellion, and return thereon, it is ordered by the court, that the said serjeant at arms, or his deputy, do forthwith go and take the said defendant into his custody, and him safely keep, and bring him into this court to answer for his said contempt, and to do and receive what

this court shall thereupon further order in the premises; and for so doing, this order, or a true copy thereof, shall be a sufficient authority to the said serjeant at arms, or his deputy, one of whom is hereby required to certify to the court his proceedings against the said defendant, by virtue hereof, with all convenient speed.

When the order is entered, an office copy of it must be had from the register, which the plaintiff's solicitor delivers to the serjeant at arms, or his deputy, as his authority, who usually makes the following return thereon.

Return of the
serjeant at arms.

To the Right Hon. Sir *Archibald Macdonald*, Kt. Lord Chief Baron of his Majesty's court of Exchequer, at Westminster, and to the rest of the Barons of that honourable court.

These are to certify, that, in pursuance of the within mentioned order, I have caused diligent search and inquiry to be made after *C. D.* the defendant in this cause, but cannot find him so as to bring

bring him into this court, as I am within commanded.

The answer of *John Jordan*,
deputy serjeant at arms.

The fee paid to the serjeant at arms His fees. upon this certificate is 3*l*. 6*s*. 8*d*.; but where the defendant is taken into custody, he is intitled to a caption fee, and other fees of detainer, till the defendant is brought into court and discharged. And these fees must be paid before the defendant can be discharged.

If the serjeant at arms cannot take the defendant as required by the order, it is necessary, as the foundation of the next subsequent process of sequestration, that he should first certify that fact; and the reason seems to be, because the commissioners in the commission of rebellion are of the plaintiff's own nomination, and the court *ex abundanti cautela* will not issue process to seize the real and personal estate of the defendant, until its own officer shall certify the fact of his inability to take the defendant; and hence it is, that the return of the

M 4

fer-

serjeant at arms is recited in the fequestration.

He cannot take security from the party to appear.

A serjeant at arms cannot take a bond as a security for the defendant's appearance. *Jones v. Clement & Hughes*. *Bunb.* 50.

Proceedings upon process of contempt, upon insufficient answers, where the defendant has before incurred a contempt for want of an appearance.

By the 17th general rule of the court, "every defendant in contempt for not appearing, and that shall after clear his contempt and appear, but shall incur any other contempt for not answering according to the rules, shall pay the like costs, and have the process of contempt continued against him till there be a sufficient answer put in as if he had not appeared; and the like rule where persons are in contempt for not answering, until they shall have fully answered; but, upon clearing his contempt, he is to have an allowance of what costs he paid upon the former contempt."

The construction put upon this rule.

This rule is only to be understood as to such preceding process of contempt

tempt as hath been actually returned by the sheriff; for if none hath been returned, the process, for want of an answer, must begin with the attachment.

Process

*Process by Sequestration to compel
Appearance and Answer.*

Sequestration,
when first in-
troduced.

In the time of
Lord Bacon.

THE next and last process after a serjeant at arms, is that of a sequestration. This writ is said to have been first introduced in the time of Lord Bacon, and then but sparingly used in process, and after a decree to sequester the thing in demand. 1 Vern. 421.

Now become
the common
process of the
courts of equity.

It is now become the common process in the courts of equity, and may be said to be two-fold, that is, it issues either as mesne process on the defendant's default in not appearing, or not answering, after the whole process of contempt hath been spent against him; or it issues as a judicial process in pursuance of a decree, and to enforce the performance of it; and it is the execution and life of a court of equity; and, as it is the fruit of a long suit, it is to be favoured, and in this case it is said to be analagous to an execution at the common law. 1 Williams, 308.

A se-

A sequestration is held to be more effectual than an execution by *feri facias* at law; for a sequestration may be awarded against the goods, though the party is in custody upon the attachment; whereas at law, if a *capias ad satisfaciendum* be executed, there can no *feri facias* issue. *Cas. temp. Talbot, 222.*

Sequestration in a court of equity more effectual than a *feri facias* at law, and why.

A sequestration on mesne process is issued, by order of court, upon a *non est inventus* being returned by the certificate of the serjeant at arms. It is usually directed to two or more commissioners, empowering them to sequester the defendant's real and personal estate into their hands, and to receive and sequester the rents and profits of his real estate, until the defendant shall have appeared to, or answered, the plaintiff's bill, or the court shall have made further order to the contrary touching the contempt.

Sequestration on mesne process,

directed to two or more commissioners.

If the sequestration issues for want of an appearance, the commissioners may seize and sequester the defendant's real and personal estate to compel an appearance; but if it issues for want of an answer, in that case the commissioners must

How executed for want of an appearance.

How for want of an answer.

must not seize, but make a *Nichil* return, and then the cause is to be heard thereon, and the bill taken *pro confesso*, and a decree is accordingly made with costs to be taxed. For this distinction, see *Desbrow v. Crommie*. *Bunb.* 272.

Sequestrators cannot sell goods sequestered for want of an appearance.

It was moved, that the *irregularity* of a sequestration, which was taken out against the defendant for not appearing, might be referred to the master, by reason of its being taken out sooner than by the course of the court it could, and yet the sequestrators had taken the goods off the premises; it was clear the sequestrators could do that, because a sequestration upon mesne process answers to a *distringas* at law. But the court agreed, that the sequestrators could not sell the goods. *Mich.* 1729, in *Scac. Barnard*. *Rep. in B. R.* 212.

Order for a sequestration on the return of a serjeant at arms.

the day of 1795.

Between *A. B.* plaintiff,

and

C. D. defendant.

By bill.

Whereas by an order of this court, made in this cause, bearing date the day

day of last, it was ordered, that the serjeant at arms attending the Right Hon. the Lords Commissioners of his Majesty's treasury, or his deputy, should forthwith go and take the above-named defendant *C. D.* into custody, and him safely keep, and bring him into court to answer for his contempt of this court, in not appearing to the plaintiff's bill; and that the said serjeant at arms should certify to this court his proceedings thereon.—And whereas the deputy serjeant at arms hath returned the said order into this court, and certified thereon, that the said *C. D.* *was not found*, as by a certificate under the hand of *J. W.* gent. deputy serjeant at arms, appeared. It was therefore prayed, that a commission of sequestration might be awarded, under the seal of this court, to sequester the real and personal estate of the said defendant for his said contempt.—Whereupon, and on reading the said order and certificate, it is ordered by the court, that a commission of sequestration be forthwith issued, under the seal of this court, directed to certain commissioners, to be named by the said plaintiff, to seize and sequester the real and personal estates

estates of the said defendant, and to levy the rents, issues, and profits thereof, until the said defendant shall have cleared his said contempt, and shall have appeared to the said plaintiff's bill, and until this court shall have made further order herein.

Form of the
sequestration.

George, &c. To *A. B. C. D. E.* and *F.* Whereas *J. T.* hath lately exhibited his English bill of complaint before the Chancellor and Barons of our court of Exchequer, at Westminster, against *J. S.* defendant. And whereas the said *J. S.* having been duly served with process of *subpoena*, issued out and under the seal of our said court, to appear to and answer the said bill, - hath hitherto refused to appear thereto, but stands in contempt of our said court, all process of contempt having issued out of our said court against the said *J. S.*—And moreover our serjeant at arms, attending our said court, hath made diligent search after the said *J. S.* but hath not been able to find him, as by the certificate of our said serjeant at arms manifestly appears.—Know ye therefore, that we, trusting to your fidelity, industry, and circumspection, have ap-

appointed you our commissioners, and by these presents do give unto you, or any two or more of you, full power and authority to enter upon, and possess all and singular, the messuages, lands, tenements, and hereditaments, of him the said J. S. and of taking and sequestering the same; and also all his personal estate, of what kind soever, into the hands of you, or any two or more of you; and therefore we command you, or any two or more of you, that at such time and place, or times and places, which you, or any two or more of you, shall appoint for that purpose, you do assemble, go to and enter upon all and singular the said messuages, lands, tenements, hereditaments, and premises, of him the said J. S. and from time to time take and sequester the same, and the rents and profits thereof, and also all his personal estate, of what kind soever, into the hands of you, or of any two or more of you, until the said J. S. shall have appeared to the said bill, and our said court shall have made further order therein. In witness whereof we have caused these our letters to be made patent. Witness, &c. at Westminster,
the

the day of in the
year of our reign. By order of court
made the same day, and by the Barons.

Eliot.

Sequestration,
how to be exe-
cuted.

The sequestration being issued in this form to the sequestrators, or any two or more of them, two of them must serve copies of the sequestration on the several tenants, that is, one of the two must serve it in the presence of the other; they cannot delegate their power by making an attorney for this purpose. The tenants must be served personally, and this service of the sequestration, by the sequestrators on the messuages, lands, &c. is considered as a seizing and sequestering under the authority of the writ: upon an affidavit of service of the sequestration, an order is to be obtained that the tenants may attorn and pay their rents to the sequestrators, as they accrue due, until further order; and the tenants must be served personally with a writ of execution of the order.

Order upon the
tenants of the
defendant to
shew cause why
they should not
attorn and pay
their rents to
sequestrators.

The court made an order to shew cause why the tenants of the defendant should not attorn and pay their rents to the

the sequestrators. *Rowley v. Corp, of Bridgwater, 17th June, Trin. Term, 1788, in Scac.*

If sequestrators are obstructed in the execution of their duty, the court, on application, will order a writ of assistance to issue, directed to the sheriff of the county, requiring him to assist the sequestrators in the execution of their commission. *Granslade v. Baker. Bunb. 168.*

If sequestrators are obstructed, a writ of assistance issues to the sheriff.

The party who takes out a sequestration shall not be answerable for the acts of the sequestrators, for they are the officers of the court. *1 Vern. 160, 161.*

Party who issues the sequestration not answerable for the acts of the sequestrators.

Sequestrators are amenable to the court for what they do in the execution of their commission. They are to make a return of what they have seized, and if money comes into their hands they must bring it into court, to be disposed of as the court shall direct; and it is said they can retain only so far as to satisfy the contempt. *1 Vern. 248.*

Sequestrators are amenable to the court.

And after seizure of some goods, for want of an appearance, ought to apply to the court for further directions,

After a seizure of *some* goods for want of an appearance, sequestrators ought to apply to the court for further directions, for the process is to be looked upon only as a *distingas ad infinitum* at law. *Bunb. 272. Barnard Rep. in B. R. 212.*

Sequestration issuing as mesne process determines by the death of the party, but not so in pursuance of a decree.

A sequestration issuing as mesne process is determined by the death of the party, but not so in pursuance of a decree; and it binds from the time of awarding. *1 Vern. 98, 118, 166, 248.*

One defendant proceeded against to a sequestration, and not appearing, plaintiff may proceed against the others.

This process of sequestration has been compared to an outlawry at common law; so that if a defendant, who cannot be found, is proceeded against to a sequestration, and does not then appear, the plaintiff may proceed against the rest. *2 Ch. Ca. 139.*

Sequestration may issue against an infant.

A sequestration may issue against an infant for not appearing. *2 Ch. Ca. 163.*

If a necessary defendant be prosecuted regularly to a sequestration, the plaintiff may go on without him against the other defendant. *Preced. in Chan. 99. Parker v. Blackburne.*

Where

Where the sequestrators seize the real estate of the party, any tenant, or other person, who claims title to the estate so sequestered, either by mortgage, judgment, lease, or otherwise, who hath a title paramount to the sequestration, shall not be obliged to bring a bill to contest such title, but he shall be let in to contest it in a summary way; and he may move the court, as of course, to be examined *pro interesse suo*. In this case the plaintiff is to exhibit interrogatories in order to examine him for a discovery of his title to the estate, and he must be examined upon such interrogatories accordingly. And the master must state the matter to the court, and the parties may enter into proof, touching the title to the estate in question. And when the master hath stated the whole matter, the court proceeds to give judgment therein upon the report; and if it appears that the party, who is examined *pro interesse suo*, hath a plain title to the estate, and is not affected with the sequestration, then it will be discharged, as against him, with or without costs, as the court shall determine upon

A real estate sequestered, a party, claiming title paramount to the sequestration, need not file a bill, but may be examined, *pro interesse suo*, in a summary way.

the circumstances of the case, and so
vice versa. *Bac. Abr. vol. 4, 427.*

Lands se-
questered,
charged with an
annuity to the
wife, discharged
upon the death
of the husband.

Where lands of the husband, out of
which an annuity to the wife issued, were
sequestered, the husband dying, the se-
questration was discharged as to the an-
nuity. *1 Chan. Rep. 247.*

But sequestra-
tion must be re-
turned before
motion can be
made to dis-
charge it.

A sequestration must be returned be-
fore it can be moved to discharge it, on
the death of the party, as to lands.
Bunb. 31.

The corpse of a
prebendary may
be sequestered,
but otherwise as
a member of
the body ag-
gregate.

If a prebendary has a distinct corpse,
or estate incident to his prebend, it may
be sequestered; but where he is only a
member of the body aggregate, and the
inheritance is in the dean and chapter,
there cannot be a sequestration. *1 Salk.*
320.

One claiming
title to se-
questered goods
to be examined
pro interesse suo,
and in the mean
time the goods
to be restored
on giving se-
curity.

A person claiming title to goods seized
under a sequestration, obtained an order
that the party prosecuting the sequestra-
tion might exhibit interrogatories against
him, to examine him *pro interesse suo*,
and in the mean time that the goods
might

3

might be restored to him on his giving security. *Martin v. Willis*, 10th May, 1745, in *Scac.* N.B. This order was directed by the court to be made similar to that in *Mackenzie v. The Marquis of Powis*, 6th July, 1739, which was settled by the court.

Upon the return of a sequestration, for want of an answer, the court ordered the costs to be taxed, and the sequestrators to retain the same, out of the money received for rent, and to bring the remainder into court. *Howell v. Lord Coningsby*, 9th June, 1726. *Liber Ordin.* in *Scac.*

On the return of sequestration, for want of an answer, costs ordered to be taxed, and retained by sequestrators, and remainder brought into court.

If, before a sequestration is awarded, the defendant shall have conveyed his land by coven, the sequestration shall be awarded against the defendant and his assigns, and the person to whom the land is assigned may be taken upon the sequestration. 2 *Ca. Ch.* 44.

If, before sequestration, the defendant shall have conveyed his land by coven, sequestration to be awarded against him and his assigns, and assignee may be taken upon it.

George, &c. To the sheriff of the county of *Middlesex*, greeting. Whereas by our commission of sequestration, under the seal of our Exchequer at Westminster,

Writ of assistance to sequestrators.

fter, bearing date the day of
 laſt, we have assigned *W. P. N. B. &c.*
 gentlemen, and have given to them, or
 any two of them, full power and autho-
 rity, at ſuch days and times as they, or
 any two of them for that purpoſe ſhould
 appoint, to go to and enter upon all
 and ſingular the lands, tenements, and
 hereditaments of *J. M.* and to ſeize and
 ſequeſter the ſame, and the rents and
 profits thereof, and likewise all the perſo-
 nal eſtate whatever of him the ſaid *J. M.*
 into their, or any two of their hands,
 and until the ſaid *J. M.* ſhould clear
 himſelf of his contempt of our ſaid court
 of Exchequer, mentioned in the ſaid ſe-
 queſtration, for (*not appearing to, or an-*
ſwering,) a certain bill of complaint in
 a cauſe there depending between *A. B.*
 plaintiff, and *C. D.* and the ſaid *J. M.*
 defendants, as by the ſaid commiſſion of
 ſequeſtration does more at large appear.
 And whereas we are given to underſtand
 that the execution of the ſaid commiſ-
 ſion of ſequeſtration hath been obſtructed;
 therefore in proſecution, and to enforce
 the ſaid *J. M.* (*to appear or anſwer*);
 we command and firmly injoin you,
 that you omit not, by reaſon of any
 liberty,

tion, issuing under the seal of our court of Exchequer at Westminster, we assigned you to be our commissioners, and gave you full power and authority to enter upon all and singular the lands, tenements, and hereditaments of *J. M.* and to take and sequester the same, and the rents, issues, and profits thereof, and also all the personal estate whatsoever, of the said *J. M.* into your hands, until the said *J. M.* should have (*appeared to, or fully answered,*) as by the said commission of sequestration more fully appears. Now for certain reasons, the Barons of our said Exchequer thereunto moving, we command you, that, immediately after your receipt of this our writ, or notice thereof by you had, you wholly supersede the execution of our said commission of sequestration; and if you, or any of you, have entered upon all or any of the lands, tenements, or hereditaments, of the said *J. M.* or have taken or sequestered the same, and the rents, issues, and profits thereof, or any of the personal estate of the said *J. M.* into your hands; that you amove yourselves from the said lands, tenements, and hereditaments, and every part thereof,
and

and restore the same, with whatever else you, or any of you, have taken and sequestred, as aforesaid, to the said J. M. or to his assigns, our said commission of sequestration, or any thing therein contained to the contrary, in any wise notwithstanding. Witness, &c. By order of court made the same day, and by the Barons.

Eliot.

Letter

*Letter Missive to Appear and
Answer.*

Persons intitled
to letters mis-
sive.

THE persons intitled to letters missive are Peers and Peereffes of the realm, and Bishops; but if the woman obtains nobility, by the marriage of a Duke, &c. and after his death marries under the degree of nobility, she loseth the dignity of her first marriage, and is not to be served with a letter missive. *Co. Lit. sect. 9, pa. 16, E. F. 6. Co. Rep. 53.*

Bill filed against
a Peer or a
Peereffs to pray
a letter missive.

Every bill filed against a Peer or a Peereffs of the realm, or a Bishop (who is a Lord of parliament), must pray a letter missive, which must be served upon the party in order to ground the subsequent process of the court to compel an appearance and answer to the bill. It is not certain at what period the letter missive first commenced; but some writers have said, that the courts of equity adopted this mode of proceeding early in the reign of Queen Elizabeth. *Prac. Reg.*

Reg. 341. However it be, precedents of great antiquity are to be found of it in this court, and the long continued practice of it seems to be founded in a peculiar courtesy and respect to the peerage, presuming that persons of that rank are more attentive to the calls of justice than men of lower degree; and hence it has obtained, that the Lord Chief Baron and another Baron, or any two of the Barons, under the form of the letter missive, have requested the party to appear and answer the bill before the ordinary compulsive process of the court hath been permitted to issue.

Though the letter missive is not such process as subjects the party to a contempt, yet it is such process as gives the party suing it out priority of suit. *Price v. Lord Coningsby. Bunb. 124.*

Letter missive not process which subjects the party to a contempt, but gives the party suing it priority of suit.

To the Right Honourable, &c.

May it please your Lordship.

The form of the letter missive to appear and answer.

After our hearty commendations to your Lordship, whereas there is an English bill exhibited in his Majesty's court of Exchequer at Westminster
against

against your Lordship by J. S. we have therefore thought fit to give your Lordship notice thereof rather by these our letters, than by awarding his Majesty's ordinary process against you; wherefore these are to pray your Lordship to give order for the entering of your appear-

The day of the
return.

ance on the day of next,
and the putting in your answer, according to the usual course, with all convenient speed; of the which nothing doubting but that your Lordship will have the care and regard which thereunto appertaineth, we bid your Lordship heartily farewell.

Your Lordships very loving friends,

Ar. Macdonald.

B. Hotbam.

Westminster, the day of 1795.

How obtained.

To obtain this letter missive application is made for it to the clerk in court, who files the bill in which it is prayed. He writes it upon a treble fixpenny stamped paper, and then procures the signature of two of the Barons thereto.

The

The original letter may either be How served.
served personally with an office copy of
the bill, or both may be left at the house
of the party, with any of the family, at
any time of the day of the return; in
consequence of which, if no appearance
is entered within two days after service,
if the same be to appear on a day cer-
tain, or in one day if it be to appear
immediately, then, on an affidavit of
service, application may be made to the
court for an order that a writ of *subpæna*
may issue against such Peer or Peerefs;
and if, upon service of this writ, no ap-
pearance is entered, in that case, upon
an affidavit of service of the *subpæna*,
the court will, on motion, order that a
sequestration do issue against the defen-
dant, unless cause, on that day seven-
night.

That this order may have its due effect,
a writ of execution of it must be served
personally; and if, after that service, the
defendant does not appear, then, upon
an affidavit of service, the court will,
on motion, order a sequestration; but as
it is often found difficult to serve the
order personally, and that the person
em-

Order for a se-
questration nisi
to be served per-
sonally.

In what case
personal service
may be
dispensed with.

employed to serve it is denied access to the party, and that there is reason to believe that the party purposely avoids being served with the order, upon an affidavit, stating the fact, the court can substitute another kind of service, namely, that of leaving a copy of the order at the house of the party; and if obedience is not paid thereto, upon an affidavit the court will order a sequestration to issue. *Mackenzie v. Marquis of Powis*, 19th May, 1739, in Scac.

Process

*Process by Sequestration to compel
a Peer or Peerefs to Appear and
Answer.*

THE writ of sequestration against a Peer or Peerefs is the same in form as that which issues against common persons who stand out the ordinary process of contempt to this writ; and the like rules which are prescribed to the sequestrators, in the execution of it in common cases, equally apply to their conduct in this.

Sequestration
against a Peer
or Peerefs, how
executed,

The first process of contempt against a menial servant of a Peer of the realm, for want of an answer, is a sequestration *nisi*, in the same manner as in the case of the Peer himself. 1 *Will. Rep.* 535.

The first process
against the me-
nial servant of a
peer is a se-
questration *nisi*.

Where it issues for want of an appearance, the sequestrators, as hath been before observed in ordinary cases, may seize and sequester the defendant's real and personal estate to compel an appearance;

If it issues for
want of an ap-
pearance, the
sequestrators
may seize real
and personal
estate.

If for want of answer, sequestrators must not seize, but return *nulla bona*.

ance; but if it issues for want of an answer, the sequestrators must not seize, but return *nulla bona* thereon, on which an order must be obtained to set down the cause to be heard on the sequestration, when the bill will be taken *pro confesso*. *Bunb. 272.*

Order to set down cause upon sequestration.

An order to set down a cause to be heard upon a sequestration may be obtained in the term, so as to be heard at the sittings after it; or, if the order be obtained at the sittings, the cause may be heard in the following term. This order is granted of course, upon reading the sequestration, and the return thereon.

Goods of a Peer sequestered, a party examined *pro interesse suo*.

A person moved that he might be examined *pro interesse suo* (he claiming the property of the goods), and that the party prosecuting the sequestration might exhibit interrogatories for that purpose in eight days. *Mackenzie v. Marquis of Powis, 6th July, 1739, in Scac.*

A mortgagee examined *pro interesse suo*.

A mortgagee obtained a like order in the same cause to be examined *pro interesse suo* before the Deputy Remembrancer,

brancer, who was to be armed with a commission for that purpose, for the examination of witnesses as he should think proper. *Mackenzie v. Marquis of Powis*, 19th July, 1739, in *Scac.*

Where a defendant, for want of putting in his answer, has stood out the whole line of process to a sequestration, and the bill taken *pro confesso*, on a decree against him *ad computandum*, the court will not discharge the sequestration on payment of costs of the contempt only, but will keep it on foot as a security to the plaintiff for the defendant's appearing before the master to take the account. 3 *Atk.* 468. *Maynard v. Pomfret.*

Sequestration not discharged upon a bill taken *pro confesso*, but to remain as a security on a decree *ad computandum*.

If there be an order *nisi* for a sequestration against a Peer for want of an answer, and the Peer puts in an insufficient one, the order for a sequestration shall not be made absolute, but a new order for a sequestration *nisi* shall be made. *Lord Clifford's case*, Mich. 1726. 2 *Will. Rep.* 385.

Sequestration against a Peer for want of his answer, and the answer insufficient, a new sequestration *nisi* to issue.

Service of sequestration where a Peer avoids being served there-with.

Where a Peer avoided the service of an order for a sequestration, it was ordered, that service thereof upon his clerk in court, and at the dwelling-house of the defendant, should be good service; and if no person was to be met with there, then that fixing a copy of the order on the door should be good service. *Mackenzie v. Marquis of Powis, 19th May, 1739, in Scac.*

Sequestration nisi ordered against a judge for want of an appearance.

A bill was exhibited in this court against the honourable Sir John Fortescue Aland, Kt. one of the judges, and other defendants. Sir John was served with a *subpœna* to appear in the ordinary way, but neglected to enter his appearance: upon an affidavit of service of the *subpœna* it was now moved that a sequestration might issue against him, to sequester his real and personal estates, unless cause should be shewn to the contrary on the first day of Michaelmas term following, which was ordered accordingly. *Tooke v. Sir John Fortescue Aland, and others, 15th July, 1745, in Scac.* N. B. This motion being made at the sittings, the first day of Michaelmas term was the earliest day on which the

the defendant could shew cause, otherwise eight days are only allowed to shew cause during the term; and if there should not be so many days remaining of the term, then cause must be shewn at the sittings after the term.

Q 2

Process

Process against a Member of Parliament to Appear and Answer.

Process against a member of parliament by *subpœna*, and an office-copy of the bill.

THE privilege of members of the house of commons, as it relates to suits in a court of equity, in which they are defendants, is nearly equal to that of Lords of parliament. The persons of both are equally sacred, and alike protected from the ordinary process of attachment. The only specific difference is, that where a letter missive is served upon a peer, the writ of *subpœna* is served upon a member of parliament; but in the primary process of bringing these privileged persons into court, both must be served with an office-copy of the bill signed by one of the sworn clerks.

How served.

The *subpœna*, accompanied with an office-copy of the bill, may either be served personally upon the party, or left at his dwelling-house, or place of usual residence, with one of his family.

If

If after service the defendant doth not appear in time, upon an affidavit of service the court will order a sequestration *nisi*; and the same course of proceeding which hath been before treated of under the head of process of sequestration, as against peers and peereffes to compel them to appear and answer, will in all respects apply to members of the house of commons.

If no appearance the court will order a sequestration *nisi*.

*Process by Distringas to compel
a Corporation to Appear and
Answer.*

Writ of *distringas*, what.

THE writ of *distringas* is the first process to compel a corporation to appear to a bill filed against the members of it in their corporate capacity. It issues under the seal of the court, directed to the sheriff, commanding him to distrain their lands and chattels in his bailiwick, and to answer the issues of their lands, until they shall obey the summons of the court, by appearing to the plaintiff's bill.

The form of the *distringas*.

George, &c. To the sheriffs of the city of London; greeting, we command you that you omit not, by reason of any liberty, but enter the same, and distrain the mayor, commonalty, and citizens, of our said city of London, by all their lands and chattels in your bailiwick, so that they, or any others by their orders, lay hands on them until you are otherwise commanded by us concerning the same:

fame: And that you answer to us the
issues of the said lands, and have their
bodies before the Barons of our Exche-
quer at Westminster, on the day of
next, to appear to, and answer,
a certain *English bill* lately exhibited
against them, before the Chancellor and
Barons of our said Exchequer, by *A. B.*
plaintiff; and that you then have there
this writ. Witness, &c. at Westminster,
the day of in the year
of our reign. By the Barons.

Eliot.

At the suit of *A. B.* by bill.

Indorsed.

Fowler.

If the defendants do not appear upon
the first *distringas*, on which the sheriff
usually returns small issues, such as 40s.
or at most 5l. the court must be moved
for an *alias distringas*, and that the sheriff
may return larger issues; upon which the
court will order to what amount the
sheriff shall return them, so that due
obedience may be enforced to the pro-
cess of the court.—And the like course
is to be taken where the defendants re-
fuse to answer.

Proceedings
thereon for
want of an ap-
pearance.

The same as for
want of an
answer.

Sequestration
ordered after
four writs of
distringas.

In the case of *Rowley v. The Corporation of Bridgwater*, in this court, two writs of *distringas* issued against them in Michaelmas term, 1787, to appear to the bill then exhibited against them; and upon the return of these writs, two others were awarded in Hilary term, 1788: upon these four writs the sheriff returned small issues, and the defendants still refused to appear. In Easter term following the plaintiff applied to the court for a sequestration, upon an affidavit which stated, that the sheriffs of Somersetshire had distrained effects belonging to the defendants, in their corporate capacity, to a small amount, and that they had secreted other parts of their effects: that they were seized of the rectory of Bridgwater, and of the tythes thereof, as well as of divers messuages, lands, tenements, tolls, &c. arising out of the borough, and that, notwithstanding these four writs of *distringas* had been awarded against them, they had refused to appear. It was now moved, on the part of the plaintiff, that a sequestration might issue to sequester the real and personal estates of the corporation, until they should appear to the bill, satisfy their contempts, and

and the court should make further order;
and which was ordered accordingly.
Easter term, 1788, Liber Ordin. in Scac.

In the same cause, in Trinity term following, viz. 7th June, 1788, on the return of the certificate of the commissioners upon the sequestration, the court ordered, that the several tenants of the corporation, whose names were inserted in the certificate, should shew cause why they should not attorn and pay their rents to the sequestrators. The defendants not shewing any cause to the contrary, this order, on the 27th June following, was made absolute. *Ibid.*

Tenants ordered
to attorn and
pay their rents
to the sequestra-
tors.

N. B. After these proceedings the corporation appeared to the bill, and discharged the costs of their contempt.

The Attorney-General exhibited an information against the *East-India Company*, and a *distringas* issued against them for want of an answer, which the sheriffs of London returned with small issues. Upon issuing the second writ, the court was moved that the sheriffs might return larger issues, and the court ordered that

Twenty pounds
issues ordered
upon a second
distringas for
want of an
answer.

20*l.* issues

20*l.* issues should be returned upon the second *distringas*. *Attorney-General v. The East-India Company, 24th Oct. 1712, in Scac.*

The sheriff returned 5*l.* issues upon the first *distringas*.

A *distringas* issued against the Governors of the free grammar-school at *Luton*, in *Herefordshire*, for not answering an information filed against them by the Attorney-General, at the relation of *William Bytheway*, and another person, and the sheriff of that county returned 5*l.* issues upon the writ. Mr. Price now moved that another *distringas* might issue, and that the sheriff might return better issues; whereupon the court ordered 20*l.* issues to be returned. *Attorney-General, at the relation of Bytheway, and another, 13th Nov. 1751, Liber Ordin. in Scac.*

The court ordered him to return 20*l.* upon the second writ.

And 50*l.* upon the third *distringas*.

In the same cause, upon a further application to the court to compel the defendants to put in their answer, upon reading the two writs of *distringas* which had issued, and the returns thereon, the court ordered a third *distringas*, and the sheriff of *Herefordshire* to return 50*l.* issues thereon. 24th June, 1752, *Liber Ordin. in Scac.*

Of

Of the Writ of Ne Exeat Regno.

THIS court, not possessing the writ of *ne exeat regno*, makes an order in the nature of that writ, by which the party who is about to abscond and leave the kingdom is equally restrained, and called upon to shew cause why he should not, within a week after service of the order, give security, by recognizance, to his Majesty, to be approved of by the master, in such sum as the court shall direct, until he shall have performed such order and decree as this court shall hereafter make in the cause.

This court makes an order, in the nature of a writ of *ne exeat regno*, to restrain a party from leaving the kingdom.

Except upon security.

The sum in which the party and his sureties are to be bound in the recognizance is in the discretion of the court, and depends upon the object of the suit.

And limits the sum.

To obtain this order the bill is first filed, but the order may be moved for either before or after answer, upon an affidavit verifying the charges in the bill by which the money appears to be due

to

How the order is obtained.

to the plaintiff, and proving that it is the declared intention of the defendant to go beyond sea, or out of the kingdom, whereby he may avoid the justice of the court.

Form of the
order.

Tuesday, the 16th December, 1794.

Between *James Curgenvven* and
Daniel Watkins, two of the exe-
cutors and devisees of *Hermione*
Cargey, deceased, plaintiffs,

And

Samuel Peters, Dr. of Laws,
and *Robert Cargey*, defendants.

By bill.

Upon the motion of Mr. *Richards* of
counsel, on behalf of the plaintiffs, in-
forming the court, that *Thomas Moffatt*,
doctor of physic, deceased, by his last will
and testament in writing, dated the 15th
August, 1786, amongst other things,
gave and bequeathed to the defendant
Peters, his heirs, executors, and admin-
istrators, all the rest and residue of his
estate, real and personal, upon trust that
the same should be applied and disposed
of

of to the proper use and behoof of *Hermione Cargey*, the wife of the defendant *Robert Cargey*, separate and apart from her said husband, and appointed the said defendant *Peters* sole executor of his said will; and the said *Samuel Peters* duly proved the same in the proper ecclesiastical court, and by virtue thereof possessed himself of the personal estate of the said *Thomas Moffatt* to a very great amount, and more than sufficient for the payment of his debts, legacies, and funeral expences: And further informing the court, that the said *Hermione Cargey* had since departed this life, having first made and published her last will and testament in writing concerning the personal estate of the said *Thomas Moffatt*, bequeathed to her as aforesaid, and appointed the plaintiffs executors thereof; and that the said plaintiffs had obtained a limited probate of her said will, so far as the same related to the residue of the personal estate of the said *Thomas Moffatt*; and that the said plaintiffs had lately exhibited their bill in this court against the said *Samuel Peters* and *Robert Cargey*, praying, amongst other things, an account of the personal estate and effects

effects of the said *Thomas Moffatt*, possessed by the said defendant *Samuel Peters*, or by any other person or persons by his order, or for his use, and that the clear residue of the said personal estate might be paid over to the said plaintiffs; to which said bill the said defendant *Peters* had appeared and put in his answer: And further informing the court, that the said defendant *Peters*, in a conversation with the plaintiff *James Curgenvin*, on or about the 1st day of December, inst. that he the said defendant intended to leave England, and proceed to the state of *Vermont* in *America*, where he intended to settle and reside; and that the said defendant *Peters*, on or about the 10th day of December, inst. informed one *Samuel Knowles* to the same effect, so that the said plaintiffs were apprehensive, and had great reason to believe, that if the said defendant *Peters* was permitted to go to *America*, they would be in great danger of losing such part of the personal estate of the said *Thomas Moffatt* as they were intitled to as executors of the said *Hermione Cargey* as aforesaid.—It was therefore prayed, that this court would make an order, in the nature of a writ

writ of *ne exeat regno*, to restrain the said defendant *Peters* from departing out of this kingdom until he shall have given security to the said plaintiffs in respect of their said demands, to be approved of by the Deputy to his Majesty's Remembrancer of this court.—Whereupon, and on reading the affidavit of the plaintiffs *James Curgenven* and *Samuel Knowles*, it is ordered by the court that the defendant *Peters* do, within a week after service of this order, or a true copy thereof, give security, by recognizance, to his Majesty, with two sureties, in the sum of 1000*l.* to be approved of by *Francis Ingram*, Esq. the Deputy to his Majesty's Remembrancer of this court, not to depart this kingdom until he shall have performed such order and decree as this court shall hereafter make in this cause.

N. B. No notice need be given of this motion, but the order must be served, under seal, personally upon the party.

Be it remembered that
 come in their proper persons
before Baron of this
Exchequer, the day of *Feb-*
 ruary,

Recognizance.

ruary, in the 35th year of the reign of his present Majesty King George the Third, and jointly and severally acknowledge themselves indebted to his said Majesty in the sum of one thousand pounds.

Whereas *James Curgenvven* and *Daniel Watkins*, two of the executors and devisees of *Hermione Cargey*, deceased, plaintiffs, have lately exhibited their bill of complaint in this honourable court against *Robert Peters*, doctor of laws, and *Robert Cargey*, defendants, for the purposes therein mentioned; to which bill the said *Samuel Peters* hath filed his answer: And whereas by an order of this court, made in the said cause, bearing date the 16th day of December, 1794, it was, for the reasons therein mentioned, ordered, that the said *Samuel Peters* should, within a week after service of the said order, give security, by recognizance, with two sureties, in the sum of 1000*l.* to be approved of by *Francis Ingram*, Esq. the Deputy to his Majesty's Remembrancer of this court, not to depart this kingdom until he shall have per-

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performed such order and decree as this court shall hereafter make in this cause. Now the condition of this recognizance is such, that if the said *Samuel Peters* shall depart this kingdom before he shall have performed such order or decree as this court may hereafter make in the said cause, then the said

and each and every of them, their and every of their heirs, executors, and administrators, shall and do, well and truly, satisfy and pay to his present Majesty, his heirs and successors, the said sum of 1000*l.* and every part thereof.—But if the said *Samuel Peters* shall not depart this kingdom until he shall have performed such order or decree as this court shall or may hereafter make in this cause, then and in that case this recognizance shall be void and of no effect, otherwise the same shall stand, remain, and be, in full force and virtue.

A. B.

C. D.

E. F.

Taken and acknowledged,
the day and year above
written, before

A. M.

VOL. I.

P

A de-

A defendant ordered to give security in 4000*l.* in a week, or in default attachment to issue.

A defendant was ordered to give security, by recognizance, with sureties in 4000*l.* penalty, within a week after service of the order upon his clerk in court, to perform the order on hearing, and in default an attachment to issue without further motion. *Davis v. Heron*, 27th Feb. 1753. *Liber Ordin. in Scac.*

Appear.

Appearance.

APPEARANCES to bills and English informations in equity are of two sorts, *viz.* either voluntary or compulsory.—Voluntary where the party appears, upon service of the *subpœna*, by a clerk in court or solicitor; compulsory when the party is compelled to appear by attachment or other process.

Appearance,
what.

Voluntary,
or compulsory.

But if a party hath only notice that he is named a defendant in a bill, and process is prayed against him, he hath a right to appear *gratis*, and put in his answer.

If process is
prayed against a
defendant, he
may appear
gratis, and
answer.

Defendants may appear either by attorney or in person.

By whom de-
fendants may
appear.

Infants and lunatics appear in their proper names, but always put in their answers by their guardians and committees.

Infants and lu-
natics appear in
their proper
names, but an-
swer by guar-
dian and com-
mittee.

Defendants who appear by an attorney or solicitor, may either do so by a letter

By what autho-
rity parties may
appear to
defend.

of attorney, or other authority for that purpose, accompanied with a stamped memorandum or warrant, authorizing such attorney or solicitor to defend the suit, by virtue of such memorandum or warrant, as prescribed by the *stat. of 25 Geo. 3, ch. 80.*

Officers of the court appear in person, or by their solicitor.

The officers of the court, who are always supposed to be present in court, are for that reason, it is said, required to appear *in propria personâ*. But, by the present practice of the court, they may appear either by themselves or their solicitors, and their names are always entered in the public book in the office, which records the appearance of all other defendants.

Who defend by guardian.

Infants, married women, idiots, or persons *non compos mentis*, defend by guardian.

Who defend by committee.

Lunatics defend by their committees.

In what manner the stat. directs an appearance to be entered.

By the *stat. of 25 Geo. 3, ch. 80*, the following authority is given by the defendant to his solicitor in the cause.

In

In the Exchequer.

A. B. is retained to defend by *C. D.*
as his solicitor, at the suit of *J. S.* by
bill.

J. K. defendant's solicitor.

(But if by an agent to the so-
licitor immediately retained, add)

by *G. H.* his agent.

Filed of record this
day of 1795.

Fowler.

This memorandum or warrant is
brought by the solicitor, for the defen-
dant, to his clerk in court, who there-
upon enters an appearance for him in a
public book used for that purpose, and
then files the warrant.

Warrant to de-
fend filed by the
clerk in court,
who enters the
appearance.

The above act requires, "that all
officers of courts to whom it shall ap-
pertain to receive stamped memoran-
dums, upon the commencement or de-
fence of any suit, are to file the same
under the penalty of 50*l.*" *Sec. 15.*

And to be filed
by him under
the penalty of
50*l.*

Duty on warrant not to be charged to clients, except by persons not immediately employed by them.

"None of the duties imposed by this act are to be charged to clients, except that persons, not immediately employed by the parties, may charge the duties on such memorandums to the solicitors for whom they act." *Sett.* 20, 21.

Of appearing to a *subpoena*, as prescribed by the 5th general rule of the court.

A defendant is not bound to appear till the return of the process, though he be served with it ever so long before; but, by the 5th general rule of the court, if the defendant does not appear on the next day after service of process returnable immediately, and upon the second day on process returnable upon a day certain, and on the fourth day after every common return, then, upon oath made of due service, an attachment is to be awarded.

Appearance to an injunction bill.

But in bills for injunctions to stay proceedings at law, if a defendant appears before the sitting of the court, on the next day after he is bound to appear by the above rule, it is deemed by the present practice to be an appearance in time, so as to prevent the injunction being obtained for want of an appearance; yet in strictness such a defendant is liable to

an

an attachment, and if it should be made out before he appears, he must pay the costs of it.

If a bill be brought against *baron* and *feme*, for a demand out of the separate estate of the *feme*, and the husband is beyond sea, and not amenable by the process of the court, yet if the wife be served with a *subpæna*, she must appear and answer the plaintiff's bill. *Bell v. Commissary Hyde*, 2 *Vern.* 613. *Preced. in Chan.* 328. *Tugwell v. Boughton*, 18th Dec. 1788, in *Scac.*

Bill against *baron* and *feme*, for a demand out of the *feme*'s estate, and the husband beyond sea, the *feme* must appear and answer the bill.

They only are defendants to a bill against whom process is prayed. 1 *P. Wms.* 598. But a defendant may appear to, and answer, a bill, without being actually served with process for that purpose.

They only are defendants against whom process is prayed.

But a defendant may appear and answer without being served with process.

If a defendant appears by his proper name, and he be properly named in the bill, this cures any error in the *subpæna*, or in the service of it; for the defendant having once recorded his appearance, process may issue for want of his answer.

If a party appears by his proper name, and properly named in the bill, this cures any error in the *subpæna*, or manner of service.

*Proceedings to take a Bill Pro
Confesso.*

WHERE a defendant is taken upon an attachment, for want of an appearance or answer, and the sheriff returns a *capi corpus*, it is a motion of course to apply for a *habeas corpus* thereon, that the sheriff may bring the defendant to the bar of the court, either to appear to the bill, or to have his appearance recorded according to the *Stat. of 5 Geo. 2, ch. 25*, or to answer the bill, as the case may be.

Habeas Corpus,
what.

The writ of *habeas corpus* is a writ which issues out, and under the seal, of this court, in aid of its ordinary process, directed to the warden of the Fleet, marshal of the Marshalsea, sheriff, or keeper of the prison in whose custody the party is, commanding the person to whom it is directed to bring to the bar of this court the body of the defendant, at the return of the writ, to shew cause why he should not appear to, and answer, the

the plaintiff's bill, or perform the interlocutory orders or decrees of the court, and thereby clear his contempts.

George, &c. To the warden of the prison of the Fleet, or his deputy, greeting: Form of the writ of habeas corpus to appear and answer.

Whereas we are informed that *J. S.* is detained in our said prison in your custody, we therefore command you, that you bring the body of the said *J. S.* by what name, or additional name, he is called or known, before the Barons of our Exchequer at Westminster, on the day of . . . to answer us touching certain articles then and there objected against him in a certain English bill lately exhibited against him, before the Chancellor and Barons of our said Exchequer, by *A. B.*; and further to do and receive what our said court shall order in the premises; and have you there then this writ. Witness the Right Hon. Sir *Archibald Macdonald*, Kt. at Westminster, the . . . day of . . . in the . . . year of our reign. By order of court, and by the Barons.

Eliot.

(Indorsed)

Fowler.

It

How served.

It is served by delivering it to the warden of the Fleet, sheriff, or other person, in whose custody the party is, and keeping a copy thereof.

If the party in custody is charged with other causes, they must be returned in a schedule to the writ.

Where the party is detained in prison for other causes beside that specified in the writ, the warden of the Fleet, marshal of the Marshalsea, sheriff, or other person, having the custody of the party, returns the writ, with the several causes for which he is in custody; and these causes (especially if they are many) are usually returned in a schedule annexed to the writ.

Record of the bill read the first time.

If a defendant is brought to the bar by *habeas corpus* for want of an answer, the record of the bill must be then read to him the first time; and if he is not prepared to answer it, the court will order him to be taken by the tipstaff into the custody of the warden of the Fleet, with the cause or causes of his detainer, and order the sheriff to be discharged of him, and that the warden of the Fleet do bring him to the bar of the court on that day seven-night, to have the bill read a second time; and upon being so brought

Read a second time.

brought up, and the bill read accordingly, if the defendant does not answer it he is remanded into the custody of the warden of the Fleet, and ordered to be brought up again on that day seven-night (if there be a week left in the term, if not, on the first day of the sittings after the term), to have the bill read a third time, when, upon reading the bill, if he does not answer it, the court will order it to be taken *pro confesso* against him; and the order is in this case absolute.

Read a third time.

Bill taken *pro confesso*, and order absolute.

Thursday, Feb. 12, 1795.

Between *James Johnstone*, plaintiff,

And

Thomas Gordon, Esq. and others,
defendants.

By bill.

Upon the motion of Mr. counsel, on behalf of the plaintiff, informing the court, that the said defendant *Thomas Gordon* was now brought to the bar of this court in pursuance of a writ of *habeas corpus* issued therefrom, directed to the warden of his Majesty's prison of the Fleet, in whose custody the

Of Order to charge a defendant with the bill the first time, where there are other defendants.

the said defendant remained a prisoner for debt: It was now prayed, that the said defendant might be charged with the plaintiff's bill the first time; whereupon, and on reading the said writ of *babeas corpus*, and return thereon, and the record of the plaintiff's bill, it is ordered by the court, that the said defendant be, and he is hereby charged with the plaintiff's bill the first time, and that he be remanded back into the custody of the said warden of the prison of the Fleet charged therewith, and that the said warden of his Majesty's prison of the Fleet do bring the body of the said defendant into this court at Serjeant's Hall in Chancery-lane, London, on *Tuesday the 24th day of February*, inst. being the first day of the sittings of the court after this term, in order to be charged with the plaintiff's bill a second time.

Tuesday, February 24, 1795.

Between *James Johnstone*, plaintiff,

And

Thomas Gordon, Esq. and others,
defendants.

By bill.

(Mid-

(*Middlesex.*) (*After reciting the former order proceed as follows.*) Now upon the motion of Mr. _____ of counsel, for the plaintiff, informing the court that the said defendant was, in pursuance of the said order, now brought to the bar of this court by the said warden of his Majesty's prison of the Fleet, and therefore praying that the said defendant may be charged with the plaintiff's bill a second time, the contempts incurred for want of his answer not having been cleared; and upon reading the said order, and the record of the plaintiff's bill, it is ordered by the court, that the said defendant be, and he is hereby charged with the plaintiff's bill a second time, and that the said defendant be remanded back in custody of the said warden of the prison of the Fleet charged therewith; and that the warden of his Majesty's prison of the Fleet do bring the body of the said defendant to the bar of this court, on the 22d day of April next, in order to be charged with the plaintiff's bill a third time.

Order to charge a defendant with the bill a second time.

(*Wed-*

Wednesday, the 22d of April, 1795.

(Title of the cause.)

Order to charge
a defendant
with the bill the
third time, and
take the same
pro confesso.

(*After reciting the last order of the 24th of February, proceed as follows.*) Now upon the motion of Mr. of counsel, on behalf of the plaintiff, informing the court, that in pursuance of the said order the said defendant was brought to the bar of this court by the said warden of his Majesty's prison of the Fleet; it was therefore prayed that the said defendant might be charged with the plaintiff's bill a third time, he not having put in his answer thereto; whereupon, and on reading the said order, and the record of the said bill, it is ordered by the court, that the said defendant be, and he is hereby charged with the plaintiff's bill a third time, and that the said bill be, and the same is hereby taken as confessed against the said defendant; and that he be remanded back to his Majesty's prison of the Fleet charged therewith; and that the said warden of his Majesty's prison of the Fleet, or his deputy, do take the said defendant into custody accordingly, there to remain until he, the said defendant, shall have satisfied his said contempt.

An

An order to take a bill *pro confesso* being in the nature of a decree upon which the plaintiff is to act, in order to obtain the relief prayed by his bill, where there is but *one defendant* against whom such relief is prayed, then it is necessary to state in the order the term in which the bill was exhibited, and shortly the purposes for which it was brought, and the relief it seeks against the defendant; it must then state, that the defendant being duly served with process appeared, but being in contempt for want of an answer, process of attachment, or other process, issued against him, whereby he was taken into custody; then state the two orders whereon the bill was read the first and second times, and proceed as follows: "And the warden of his Majesty's prison of the Fleet having brought the body of the said defendant to the bar of this court, this present day, to be charged with the said bill the third time, it was therefore prayed, that the said defendant might be charged with the said bill the third time, and that the same might be taken against him as confessed; and that the said defendant might be remanded back

Order to take a bill *pro confesso* where there is but one defendant.

to

to his Majesty's prison of the Fleet charged therewith; whereupon, and on reading the said order, and record of the plaintiff's bill, it is ordered by the court, that the said defendant *T. G.* be, and he is hereby charged with the said plaintiff's bill the third time; and that the said defendant be remanded back to his Majesty's prison of the Fleet, charged as aforesaid, there to remain until he shall have satisfied the said contempt; and that the said warden of his Majesty's prison of the Fleet do take him into his custody accordingly: And it is further ordered by the court, that the said plaintiff's bill be, and the same is hereby taken against the said defendant *T. G.* as confessed: And it is thereupon further ordered by the court, that it be, and it is hereby referred to *Francis Ingram, Esq.* the Deputy to his Majesty's Remembrancer of this court, to take an account (*according to the prayer of the bill*); in taking of which account the said Deputy Remembrancer is to make the said defendant all just allowances; and, for the better taking the said account, the said defendant is to be examined upon interrogatories as the said Deputy Remembrancer

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membrancer shall direct; for which purpose, and for the examination of witnesses in aid of the said account, the said Deputy Remembrancer is hereby armed with a commission, and a commission or commissions may issue into the country, directed to proper commissioners, for the same purpose if need require: and the said defendant is also to produce before, and leave with, the said Deputy Remembrancer, upon oath, all deeds, books, papers, and writings, relating or concerning the said account, as the said Deputy Remembrancer shall direct: And it is further ordered by the court, that the said defendant do pay to the plaintiff his costs of this suit, to be taxed by the said Deputy Remembrancer, to whom it is hereby referred to tax the same: And the said Deputy Remembrancer is to make his report, touching the matters hereby referred to him, with all convenient speed; and this cause is to be put in the paper of causes to be further heard upon the coming in of the said report, when such further order will be made herein as shall be just. *Vide order Dodwell v. Greenway, 24th Jan. 1770, in Scac.* N. B. The bill in this

case was taken *pro confesso*, for not answering exceptions after two insufficient answers.

Order to take a bill *pro confesso* against one defendant, in a cause where another defendant had answered.

So an order was made to take a bill *pro confesso* against one defendant, in a cause where another defendant had answered. *Webb v. Webb, and another, 6th Nov. 1793, Lib. Ordin. in Scac.*

Bill taken *pro confesso*, no answer permitted to be filed.

After a bill was taken *pro confesso*, the defendant was not permitted to put in his answer; and this was ruled on motion *per totam curiam, in Hughes v. Owen. Bunb. 299, in Scac.*

Process to compel appearance or answer, subsequent to an attachment, to issue into that county, city, or town, where the defendant last lived or resided, unless he can be arrested in another.

In issuing and executing the whole line of the process of the court to compel an appearance or answer, each specific part of such process which belongs to the execution of a sheriff must be directed into that county, city, or town, where the defendant last lived or resided, and not into any other county, city, or town, unless the defendant can be arrested therein; but no *Nichil* return of process ought to be made by the sheriff of any county, city, or town, except that into which the attachment first issued.

No *Nichil* return of process ought to be made but by the sheriff of the county, &c. into which the attachment first issued.

So ruled by Lord Chief Baron Eyre.

So

So where the defendant lived in London, and process of contempt issued into Middlesex, the court held it irregular, discharged the process of contempt without costs, and ordered the answer to be received. *Eady v. Cummin, 4th June, 1747, in Scac.*

Process of contempt issued into Middlesex, and defendant lived in London, ordered to be discharged.

A defendant appeared, but stood out all process of contempt for want of his answer; and on motion, 10th June, 1766, a sequestration was ordered upon the return of a serjeant at arms. On the 18th of the same month it was moved, as of course, to set down the cause upon the sequestration, at the sittings after that term, in order to take the bill *pro confesso*, which, upon reading the sequestration, was ordered accordingly. *Shepherd v. Shepherd, Trin. term, 1766, in Scac.*

Bill may be taken *pro confesso* upon a sequestration.

The decree of this court, in a cause set down upon a sequestration, is always absolute, whether it be for want of an appearance, or for want of an answer. In the latter case the reason of making this decree absolute must be, that the defendant appearing, but refusing to put in

Decree upon a sequestration absolute.

Reason of the decree being thus made.

any answer at all, the plaintiff is rendered incapable of joining issue, and thereby deprived of the opportunity of examining any witnesses; whereas when the defendant puts in an answer, though it be insufficient, yet the plaintiff has it then in his power to reply, and prove his whole bill, and consequently is not without remedy. 2 P. Wms. *Hawkins v. Crook.*

Decree upon a sequestration for want of an appearance may be set aside for irregularity in the process to compel an appearance.

And for the same reason for want of an answer.

Defendant taken upon an attachment, and a *capit corpus* is returned thereon.

Where a decree is made upon a sequestration for want of an appearance, the strictest caution ought to be observed that the service of the *subpœna* be regular, for should that be found irregular, all the subsequent process to compel an appearance, founded upon that irregularity, will be of no avail, and the decree may be set aside. So where a decree is made upon a sequestration for want of an answer, and any irregularity appears in issuing or executing the process to compel an answer, the decree on this ground is liable to be set aside.

Where a defendant is taken upon an attachment for want of an appearance or answer, and gives a bail-bond to the sheriff,

sheriff, and the sheriff returns a *capit corpus* on the attachment, the defendant not being in actual custody, instead of issuing a *habeas corpus*, a rule of 4 days is given by the plaintiff's clerk in court, by which the sheriff is ordered to bring the body of the defendant into court; and at the expiration thereof, upon motion, and reading the attachment, return thereon, and the above-mentioned rule, the court will order a messenger to go and bring up the defendant to the bar of the court, in whose custody he will be charged with the bill the first time, and stand committed to the Fleet, and thereupon the messenger be discharged of the body of the defendant, who will be ordered to be brought up again to the bar of the court on that day seven-night, in like manner as when brought to the bar by a sheriff under the writ of *habeas corpus*.

A rule of 4 days is given for the sheriff to bring the defendant into court, on the expiration of which a messenger will be ordered.

By the statute of the 5th Geo. 2, ch. 25, sec. 2, it is enacted, "that if any defendant be brought into court by writ of *habeas corpus*, or other process issuing out of any court of equity, and refuse or neglect to enter his appearance according

Where defendant refuses to appear, the court may appoint a clerk in court to appear for him.

cording to the rules of the court, or to appoint a clerk in court, or attorney of such court, to enter an appearance for him; the court may appoint a clerk in court, or attorney of such court, to enter an appearance for him, and such proceedings may thereupon be had in the cause as if the party had actually appeared."

"Provided, that a decree be made against such defendant who shall be in custody or forth-coming, so that he may be served with a copy thereof before any process shall be taken out to compel the performance thereof." *Sec. 3.*

How to proceed
against him.

Where the defendant is brought to the bar of the court, and refuses to appear, the court, pursuant to the above statute, appoints a clerk in court to appear for him, who records his appearance, and then the defendant is committed to the Fleet, there to remain till he has discharged his contempts; and when his time for answering is expired, the plaintiff proceeds to issue the usual process of contempt for want of his answer, and to bring him into court to charge

charge him with the bill the first, second, and third times, as in the ordinary case of taking the bill *pro confesso*.

Saturday the 28th of Feb. 1795.

Between *Sarah Weeks*, spinster,
plaintiff,

And

John Gunston, and others, defendants.

By bill.

(*Surry.*) Upon the motion of Mr. *King* of counsel, on behalf of the plaintiff, informing the court that the above-named defendant being in contempt of this court for not appearing to the plaintiff's bill, a writ of attachment had issued against him, directed to the sheriffs of the city of London, whereon the said sheriffs had returned, that they had attached the said defendant: And further informing the court, that by an order of this court, made in this cause the 11th day of February instant, it was ordered, that one of the messengers attending this court should go and receive the body of the said defendant, and bring him before this court to answer his said contempt;

Order for the court to appoint a clerk in court to appear for a defendant who refuses to appear.

Q 4

and

and that, in pursuance of the said order, one of the messengers attending this court had received the body of the said defendant, and had now brought him before this court; and the said defendant persisting in his said contempt, by refusing to appear to the said bill, it was therefore prayed by the said Mr. King, that a clerk in court may be appointed to record the appearance of the said defendant, pursuant to the statute of the 5th year of the reign of his late Majesty King George the Second, and that the said defendant may be committed to his Majesty's prison of the Fleet, there to remain until he shall have satisfied his said contempt; whereupon, and on reading the record of the said bill, the said order of the 11th of February instant, and the said messenger's return thereon, the court doth order, that Mr. Fowler, one of the clerks of this court, do record the said defendant's appearance accordingly; and that the said defendant *John Gunston* be, and he is hereby ordered to stand committed to his Majesty's prison of the Fleet, there to remain until he shall have satisfied such costs of contempt as he hath hitherto incurred.

N. B. This

N.B. This order applies to the case where the defendant has given bail to the attachment, and is not in the actual custody of the sheriff; for if he had been in actual custody, in that case the court must have been moved for a *habeas corpus* for the sheriffs to have brought him into court.

By the statute of 5 Geo. 2, ch. 25, for making process in courts of equity effectual against persons who abscond, and cannot be served therewith, or who refuse to appear if a defendant, against whom a *subpoena* or other process shall issue, shall not cause an appearance to be entered within such time and manner as, according to the rules of the court, the same ought to have been entered in case such process had been duly served; upon an affidavit being made, to the satisfaction of the court, that the defendant is beyond the seas, or that, upon enquiry at his usual place of abode, he could not be found, so as to be served with such process, and that there is just ground to believe that he is gone out of the realm, or otherwise absconds to avoid being served with the process of the court, the

Where the party absconds to avoid being served with process, the court may make an order for defendant to appear.

the court may make an order, directing the defendant to appear at a certain day.

Sec. I.

And to be inserted in the London Gazette 14 days after it is made, and published in parish-church of defendant's usual abode.

The order being thus obtained, a copy of it is, within 14 days after it is made, to be inserted in the London Gazette, and published on some Lord's-day, immediately after divine service, in the parish-church of the parish where the defendant made his usual abode within 30 days next before his absenting, and a copy of such order is to be posted up at the Royal Exchange in London; and if the defendant does not appear within the time limited by such order, or within such further time as the court shall appoint, then, on proof made of the publication of such order, the court, being satisfied of the truth thereof, may order the plaintiff's bill to be taken *pro confesso*.

Sec. I.

Hudson v. Perrott, Mich. Term, 1768.

Form of proceeding where a bill was taken *pro confesso* against a defendant absconding to avoid being served with process.

The affidavit stated, that a writ of *subpœna* had issued in this cause, directed to the defendants *Eleazar Perrott* and *Elizabeth* his wife, commanding them

to

to appear in this honourable court at a day past at the suit of the plaintiff, which had been served on the defendant *Elizabeth Perrott*; that the defendants not having appeared thereto, an attachment of contempt had issued against them, directed to the sheriff of Middlesex, who had returned a *non est inventus* thereon; and thereupon an attachment with proclamations had also been issued against the defendants; that frequent enquiry had been made after the defendant *Eleazar Perrott* at his last and usual place of abode, in order for a due execution of the said last-mentioned process of contempt, and that the said defendant might be arrested thereon, but that he could not be found so as to be served with, or attached by, such process; that there was just ground to believe that the said defendant *Eleazar Perrott* was either gone out of the realm, or otherwise absconded, to avoid being served with, or attached by, such process, and was the rather induced to believe the same, for that, upon such enquiry made as aforesaid, at the usual place of abode of the said defendant, the deponent was informed by the said defendant *Elizabeth*, that her husband had

Bill taken Pro Confesso.

had some time since absconded, and that she did not know where he might be met with.

Sworn 26th Nov. 1768,

before

T. Parker.

Monday 28th Nov. 1768.

Between *John Hudson*, plaintiff,

And

Eleazar Perrott, and *Elizabeth*

his wife, defendants.

By bill.

Order to appear.

(*Middlesex.*) Upon the motion of Mr. of counsel for the plaintiff, and on reading the affidavit of *Walter Williams*, gentleman, it is ordered by the court, that the said defendants *Eleazar Perrott*, and *Elizabeth* his wife, do appear to the said plaintiff's bill on or before the 23d day of *January* next.

Martin for plaintiff.

In the Exchequer.

(*Title of the cause.*)

Walter Williams, of *Apothecaries Hall*, *London*, gentleman, maketh oath that he

Affidavit of publishing the order.

did

did cause a copy of an order of this honourable court, made in this cause, bearing date the 28th day of November last, whereby it was ordered, that the said defendants *Eleazar Perrott* and *Elizabeth* his wife, should appear to the said plaintiff's bill on or before the 23d day of this instant January, to be posted up in a public place on one of the pillars of the Royal Exchange, in the city of London, upon the 1st day of December last, and the same was posted up accordingly: And this deponent saith, that he was present, on Sunday the 11th day of the said month of December last, at the parish-church of the parish of *St. James*, within the liberty of *Westminster*, in the county of *Middlesex* (in which said parish the said defendants last resided, or made their usual abode, within thirty days next before their absconding themselves, as this deponent is credibly informed, and verily believes), and did then and there hear a copy of the said order publicly read in the said parish-church, by the acting clerk thereof, immediately after divine service: And this deponent further saith, that he hath caused search to be made in the office of his Majesty's Remembrancer

cer of this honourable court, and he is informed, and verily believes, that the said defendants have not, nor hath either of them, appeared to the said plaintiff's bill pursuant to the said order: And this deponent further saith, that he hath been informed, and verily believes the same to be true, that the said defendants were resident in the said county of *Middlesex* within *twelve* months before the institution of this suit.

W. Williams,

Sworn 26th January,

1769, before

G. P.

Between *John Hudson*, plaintiff,

And

Eleazar Perrott and *Elizabeth*

Perrott, defendants.

By bill.

Order to set
down the cause
for hearing.

(*Middlesex.*) Whereas by an order of this court, made in this cause, bearing date the 28th day of November last, it was ordered, that the defendants *Eleazar Perrott*, and *Elizabeth* his wife, should appear to the plaintiff's bill on or before the 23d day of January last.—

Now

Now upon the motion of Mr. of counsel, for the plaintiff, informing the court that a copy of the said order had been inserted in the London Gazette from *Saturday 26th day of November* last to *Tuesday 29th day of the same month*; and that another copy thereof had been posted up in a public place on one of the pillars of the Royal Exchange in London; and that another copy thereof had been publicly read in the parish-church of *St. James* within the liberty of *Westminster*, being the parish where the said *Eleazar Perrott*, and *Elizabeth* his wife, last lived and resided, by the acting clerk of the said church, pursuant to the act of parliament in that case made and provided; notwithstanding which the said defendants, or either of them, had not appeared to the said plaintiff's bill: It was therefore prayed, that the said cause might be set down in the paper of causes in this court to be heard on *Thursday the 9th day of February* next; whereupon, and on reading the affidavit of *Walter Williams*, gentleman, and the said Gazette, it is ordered by the court as prayed.

Martin for plaintiff.

N. B. On

Bill taken Pro Confesso.

N. B. On Saturday 25th of February, 1769, the above cause came on to be heard, when, upon opening the said bill, and reading the several affidavits, Gazette, and orders, and also the said bill, the court decreed the bill to be taken *pro confesso*.

Proceedings upon the decree to take a bill *pro confesso* to sequester the real and personal estate.

In order to compel a due performance of the decree, the act of the 5 Geo. 2, *ch.* 25, enables the court "to issue process either by an immediate sequestration of the real and personal estate and effects of the party so absconding (if any such can be found), or such part thereof as may be sufficient to satisfy the demands of the plaintiff in the suit, or by causing possession of the estate or effects demanded by the bill to be delivered to the plaintiff, or otherwise, as the nature of the case shall require." *Sec.* 1.

Plaintiff to be paid his demands out of the estate or effects sequestered, and give security for a restitution upon the defendant appearing to defend.

"The court may likewise order the plaintiff to be paid his demands out of the estate or effects sequestered, the plaintiff first giving sufficient security to abide such order, touching a restitution of such estate or effects, as the court shall think proper, upon the appearance of the

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the defendant to defend such suit, and paying such costs to the plaintiff as the court shall order; but in case the plaintiff shall refuse or neglect giving such security, the estate or effects sequestered, or whereof possession shall be decreed to be delivered, are to remain under the direction of the court, either by appointing a receiver, or otherwise, until the defendant appears to defend the suit."

On refusal to give security, the estate or effects to remain under the direction of the court.

Sec. 1.

"Persons out of the realm who may be affected by such decree, if they return within seven years after the making thereof, are to be served with a copy within a reasonable time after their return, or their return or public appearance shall be known to the plaintiff; or in case they shall die before their return, and the defendant shall have any real estate sequestered, then a copy of the decree is to be served upon the heir; or if personal estate be sequestered, or possession delivered to the plaintiff, then a copy of the decree is to be served upon the executor or administrator."

Persons out of the realm affected by the decree, returning within seven years, to be served with a copy of the decree.

Sec. 4.

"If persons served with such copies shall not appear, and petition to have the

And after service shall not petition for a rehearing within

in six months,
decree to be
absolute.

cause reheard within 6 months, the decree
so served is to be absolutely confirmed,
and bar all claiming under them." *Sec. 5.*

Being served
shall, within six
months, or not
being served
shall, within
seven years, ap-
pear, and peti-
tion to be re-
heard, and give
security for
costs.

"If persons so served with a copy of
such decree shall, within six months after
service thereof, or not being served shall,
within seven years after the making such
decree, appear in court, and petition to
be heard with respect to the matter
thereof, and shall give security for costs,
may be admitted to answer the bill, and
issue may be joined, and witnesses on both
sides examined, and the cause may be
heard again as if the party had originally
appeared, and the proceedings had then
been newly began." *Sec. 6.*

But not appear-
ing within seven
years to be ab-
solutely barred.

"If persons against whom such decree
shall be made, their heirs, executors, or
administrators, shall not, within 7 years
after the making such decree, appear,
and petition to have the cause reheard,
and give security for costs, such decree
shall stand absolutely confirmed." *Sec. 7.*

Not to affect
persons beyond
the seas, who
have not been
in England
within two
years next be-
fore the *subpoena*
issued.

"Persons beyond the seas not to be
affected by this act, unless affidavit shall
be made, before the making of such
decree, that such person had been in
England within two years next before
the *subpoena* issued." *Sec. 8.*

Plain-

Plaintiff proceeded, upon the statute of 5 Geo. 2, ch. 25, to compel the defendant to appear, by publishing him in the Gazette; and the defendant having appeared, the plaintiff now moved for the costs of his proceedings to compel an appearance according to that act; but the motion was denied, these costs being to abide the event of the cause. *Atwood v. Pike, 8th May, 1734, in Scac.*

Defendant, being gazetted to appear, appeared; plaintiff applied for his costs, but motion denied.

A defendant was served with a *subpæna*, but not appearing an attachment issued against him, and every endeavour had been used to execute it, but the defendant could not be found, and it was verily believed he absconded to avoid being served with the process of the court. These facts appearing by affidavit, Mr. *Richards* moved, that a day might be appointed for the defendant to appear pursuant to the statute; and in support of his motion he stated, that it had been determined, upon a like affidavit, in two cases in the court of Chancery, the one after an attachment for want of an appearance, and the other after a sequestration, that the defendant should be gazetted; and accordingly a day was appointed for the defendant to appear. *Stodart v. Stodart, 27th May, 1786. Liber Ordin. in Scac.*

A defendant ordered to be gazetted after being served with a *subpæna*, and then absconding to avoid the process of the court.

Consolidation of Suits.

7 **W**HERE separate bills are exhibited against several defendants, which relate to the same matters, involve the same question, and seek the same relief, in order to prevent the expense and inconvenience arising from a multiplicity of suits, the court will order bills of this nature to be consolidated, and united in one bill.

Seven bills
against different
parishioners,
for an account
of tithes, or-
dered to be con-
solidated into
one.

Seven bills were exhibited by the executrix of a deceased vicar for an account of tithes within the vicarage of *Chew Magna*, with the chapelry of *Dindry* annexed, in the county of *Somerset*, from the induction of the vicar in the year 1764, to the time of his death in 1784. The bills being manifestly brought against each respective defendant for the same matters, and praying the same relief, Mr. King now moved, that these seven bills might be consolidated and reduced into one bill, and that the defendants might have a month further time to answer

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answer them; upon which the court granted a rule to shew cause as to the consolidation of the bills; but no cause being shewn, the order was made absolute. *Pyke Widow v. Brook, and six other causes by the same plaintiff. Trin. Term, 1791, in Scac.*

So where three cross bills were brought against a rector to establish *modusses*, and each bill involved the same question, and sought the same relief, the court ordered these bills to be consolidated into one suit, and that the defendant should only put in one answer. *Allgood v. Dr. Scott. Duke of Northumberland v. Dr. Scott. Charlton v. Dr. Scott, 28th June, 1788, in Scac.*

Three cross bills against a rector, to establish *modusses*, ordered to be consolidated into one bill.

Injunctions.

Injunction,
what.

AN injunction is a remedial writ, in nature of a prohibition, issuing out of this court in the following cases.

1. To stay proceedings at law, either in ejectment causes, or in personal actions; and herein to restrain the negotiating of bonds, notes, or bills of Exchange, obtained by fraud, or without a valuable consideration; and also to restrain the transferring of stock in any of the public funds.

2. To stay waste, or damage done, or threatened to be done, to the freehold or inheritance of another, by felling timber, &c.

3. To quiet possession before hearing.

4. To yield up, quiet, continue, or restore, possession of lands, &c. after hearing; and herein of perpetual injunctions.

5. Against

5. Against continuing nuisances.

6. To prevent multiplicity of suits; and herein by bill of interpleader, &c.

7. To restrain one defendant from proceeding at law against another defendant.

8. To restrain building, by stopping up ancient lights.

9. To restrain the infringement of patents; and herein from copying, engraving, &c. and selling prints, and from printing or vending printed copies of books, &c.

10. To restrain proceedings in the court of Chancery, in the spiritual court, and in the court of Admiralty.

And first of injunctions to stay proceedings at law.

This writ is directed to the defendant to restrain him from proceeding at law against the plaintiff, touching the matters mentioned in the bill. It issues by

Injunction to stay proceedings at law.

the order, and under the seal, of the court, not on account of any supremacy which this court assumes over a court of law, but in respect of its original jurisdiction as a court of equity, by which it controls the party, and not the court, from proceeding at law, in the particular case made by the bill, till the defendant shall have fully answered it, and this court shall have made further order.

Form of an injunction to stay proceedings at law.

George, &c. To *C. D.* and to all and singular your counsellors, attornies, solicitors, and agents, greeting; we firmly injoin and command you, and every of you, that from and immediately after your receipt or notice of this our writ, by you or any of you had, you or any of you do not commence, or further prosecute, any action, suit, bill, or plaint, or enter any judgment, or sue out or levy any execution, in any of our courts at the common law, against *A. B.* touching any of the matters contained in a certain bill of complaint lately exhibited by him the said *A. B.* complainant, before the Chancellor and Barons of our court of Exchequer at Westminster, against you the said *C. D.* and others

others defendants; but that you, and every of you, do from henceforth wholly and entirely surcease and desist from the commencing, or further prosecuting, any such action, suit, bill, or plaint, and from entering any such judgment, or suing out or levying any such execution, until you the said C. D. (*shall have appeared to, and fully answered*), the said bill, and our court shall make further order thereupon (but if issue is or can be joined in any such suit or action, then you may proceed to a trial thereof, but you are not to enter up judgment, or sue out execution, thereon); and hereof you are not to fail on pain of five hundred pounds, which we will cause to be levied on your goods and chattels, lands and tenements, to our use, if you neglect to obey this our command. Witness the Right Hon. Sir *Archibald Macdonald*, Kt. at *Westminster*, the day of in the year of our reign. By order of court made the same day, and by the Barons.

This clause to be inserted in Hilary and Trinity terms only, and in country causes only.

Eliot.

(Indorsed)

Fowler.

By

Injunction on
ejectment,
distress, or ac-
tion for rent,
how obtained.

By 5 Geo. 2, *ch.* 4, it is enacted, that on any ejectment, distress, or action, for rent, if the tenant files a bill for an injunction it shall not issue for want of an answer, unless the plaintiff shall verify by affidavit the material allegations of his bill.

Injunction stays
all proceedings
in an ejectment
cause before ap-
pearance at law.

If a plaintiff obtains an injunction to restrain proceedings in an ejectment cause, before he appears at law, all proceedings are stayed until answer and further order;

But after ap-
pearance the
ejectment may
be tried in a
country cause,
in an issuable
term.

but where the injunction is obtained in an issuable term, after appearance, the defendant at law pleads of course, and issue is joined, and the cause may proceed to trial without a breach of the injunction.

So in personal
actions, in
country causes,
before plea at
law, injunc-
tion stays all
proceedings.

So in personal actions, in country causes, and in an issuable term, the practice is, if the injunction is obtained before plea at law, the plaintiff at law cannot call for a plea under the clause inserted in the injunction of joining issue, because he cannot enter up judgment for want of a plea, as that would be a breach of the injunction.

If the cause of
action arises in
London, or
within

Where the cause of action arises in London or Middlesex, the injunction of this

this court restrains all manner of proceeding at law until answer and further order; and this in every term.

within five miles thereof, the injunction stays all proceedings till answer and further order.

By the statute of 4 & 5 *Anne*, *ch.* 16, process of *subpæna* may be taken out by a plaintiff, and served upon a defendant, previous to the filing of a bill which prays an injunction. But the bill must be filed the day after service of the *subpæna* if returnable immediately, and in two days after the return thereof if the same be returnable on a day certain; for an injunction is never to be granted before bill. 4 *Instit.* 92. 1 *Vern.* 156.

Manner of obtaining this writ.

On a *subpæna* returnable immediately against a party resident in London, or within five miles thereof, if he does not enter an appearance to the bill, before the sitting of the court, on the second day after being served with the writ, upon an affidavit of service, and producing to the court an attachment against the defendant, as evidence of his contempt, for want of an appearance; it is a motion of course to apply for an injunction, which is always granted until answer and further order.

For want of an appearance where the defendant lives in London, or within five miles.

In

For want of an appearance to a *subpoena* returnable on a day certain.

In like manner where a *subpoena* issues returnable on a day certain, whether the defendant resides in London or in the country, if the defendant does not enter an appearance, before the sitting of the court, on the third day after the return of the writ, upon an affidavit of service, and producing an attachment for want of an appearance, it is also a motion of course to apply for an injunction until answer and further order.

Injunction prayed against a peer or peers, how obtained.

Where the bill prays an injunction against a peer or peers of the realm, a letter missive, and an office-copy of the bill, must be first served upon such defendant; and not appearing thereupon, on an affidavit of service, the court is moved for a *subpoena*, to which, if the defendant does not appear, or appearing does not answer in time, an order is obtained of course for a sequestration to issue, unless cause in a week after service of the order; and immediately after obtaining this order (i. e. the same day), the court is moved for the injunction.

If defendant is a member of parliament, upon an affidavit

If the defendant is a member of parliament he must be served with a *subpoena* and

and an office-copy of the bill, to which if he does not appear in time, the court is moved of course, upon an affidavit of service, for a sequestration for want of an appearance, and then immediately a separate motion is made for an injunction upon the sequestration. So in like manner if he appears, but does not answer in time, the court is moved for a sequestration *nisi*, and an injunction will be granted thereon in like manner as an injunction issues upon an attachment against a person not privileged.

Where a defendant appears in time he must answer the bill by that day seven-night, after it is delivered over to his clerk in court, or the plaintiff will be intitled to move for an injunction at the sitting of the court the following day, because till the court sits the injunction cannot be moved for. In this case the attachment (like that for want of an appearance) only issues *pro formâ* in order to ground the motion for the injunction, but is never executed. The more ordinary practice which now prevails (where the defendant's answer cannot be put in within the time limited) is, for the defendant's

clerk

vit of service
a sequestration
is first moved
for, and then
the injunction.

For want of an
answer in a
town cause.

clerk in court to signify to the plaintiff's clerk in court that he may move for the injunction upon the defendant's praying time to answer; and it is incumbent upon him to obtain an order for a month to answer, the same day on which the order is made for the injunction, or the defendant is liable to an attachment.

For want of an answer in a country cause.

A defendant in a country cause hath the same time allowed him to answer an injunction bill as a defendant in a town cause, namely *eight* days from the delivery of the plaintiff's bill, and before the sitting of the court the following day; so that if a defendant, residing in the country, does not come to town, and put in his answer within that time, the plaintiff may move of course for an injunction upon the defendant's praying a *dedimus*, and the injunction continues until answer and further order. In this case a defendant, by the course of the court, hath time, to the second return of the following term, to take his answer by a *dedimus*; and if he should want further time (the proceeding being in his own delay), he may apply to the court for it as in the common case, viz. an order for

for six weeks, and on the expiration of that, another order for a month.

Where an action at law is commenced by a party residing abroad, out of the jurisdiction of this court, against a defendant resident in England, it is usual for the defendant's attorney in the action to apply to the plaintiff's attorney therein, to know if he will accept of a *subpœna*, on behalf of his client, to appear to an injunction bill in this court; upon the writ being tendered, if he refuses to accept it, affidavit being made of such an application and refusal, the court (without notice being given of the motion) will order, that service of a *subpœna*, upon the plaintiff's attorney in the action, shall be deemed good service upon the defendant in equity.

Injunction to stay proceedings at law, where the plaintiff in the action resides abroad, how obtained.

An order is thereupon drawn up and entered, and an office-copy of it made by the register, a true copy of which, together with the *subpœna*, or a copy of it, are served upon the attorney, who causes an appearance to be entered accordingly; but if he neglects so to do, then, upon the expiration of the return of the *subpœna*, and an affidavit

Service upon the attorney at law good service upon the party.

vit

vit of the facts stated by the bill, an injunction is moved for on an attachment.

In what manner this injunction is obtained for want of an appearance or answer.

When the eight days for answering this bill are expired, an attachment *pro forma* is made out against the defendant for want of an answer, directed to the sheriff of *Middlesex*; and on producing the same to the court, and reading an affidavit made by the plaintiff, verifying the facts stated by his bill, a motion is made for an injunction without notice, and if the court is satisfied with the merits of the plaintiff's case, the injunction will be ordered to issue till answer and further order.

Injunction set aside, the affidavit not verifying the material allegations in the bill.

An injunction having been obtained upon an affidavit which did not verify the charges in the bill, Mr. *Plumer* moved to set it aside with costs, for that the plaintiffs had stated by their bill, that the bills of Exchange in question, for which the action was brought, were lent for the defendant's accommodation, whereas by their affidavit they had sworn, that these bills were given to the defendant to pay the balance of his account to them, which they found to be erroneous.

neous. Upon this variance between the bill and the affidavit, the court set aside the injunction with costs. *Nunes v. Jaffray*, 10th July, 1795, in *Scac.*

N. B. Upon this occasion the court observed, that in these cases it was not expected a plaintiff should verify all the allegations in his bill with the same precision as was required in an answer; but only to substantiate in his affidavit that material head of equity in his case, which intitled him to an injunction.

Where costs were taxed upon a judgment, as in case of a non-suit, but not paid, enquiry was made of the plaintiff's attorney in the action where the plaintiff resided, that the costs might be paid; but the attorney not only refused to satisfy the enquiry, but threatened to bring a fresh action. Upon these grounds the court was moved, that service of a *subpoena* upon the plaintiff's attorney in the action, might be good service upon the party; but, *per curiam*, this differs from the ordinary case of serving a *subpoena* upon the attorney in the action at law; for in this case there is no action either

In what case the court refused that service upon the attorney should be good upon the party.

commenced or depending, and though the costs are not paid upon the judgment, they are merely personal to the party; and as to the threat used by the plaintiff's attorney, we cannot, upon that circumstance alone, order the service of a *subpæna* upon him, as that will be time enough when a fresh action is brought. *Cecil v. Reilly*, 19th Nov. 1785, in *Scac.*

Where no declaration was delivered.

An application was made to the court, that service of a *subpæna* upon the attorney at law for the defendant *Gillam Butler*, might be good service upon *Butler*. The affidavit on which the motion was made stated, that in the present term (Michaelmas 1787) separate actions had been commenced in the name of the defendant *Paul Wentworth* against the several plaintiffs as under-writers, on the policy of insurance, upon the ship *Penelope* mentioned in the bill; to stay which actions the plaintiffs prayed an injunction and a commission. That although the actions were brought in the name of *Wentworth*, the same were in fact brought on the account, and for the benefit, of the defendant *Butler*; and that

that *Wentworth* had declared that the policy was affected by him on the account of *Butler*, and by his directions; and that *Butler* was the person interested therein. That it also further appeared, by sundry papers which had been produced to the under-writers, respecting this insurance by *Wentworth*, and also by his attorney; that *Butler* resided at *Campo Bello*, in the province of *New Brunswick* in *America*, and that an application had been made to the attorney in the actions to accept of a *subpoena*, and appear for the defendant *Butler*, but which he refused; and it being admitted that no declaration had yet been delivered, the court refused to grant the motion. *Angerstein and others v. Wentworth and others*, 13th Nov. 1787, in *Scac.*

The injunction of this court to restrain a party from proceeding at law in a town cause, stays all proceedings whatever from the time the injunction is served; and it would be deemed a breach of the injunction in a party, or his attorney, to proceed one step at law after being served with a copy of this writ.

The force of an injunction in a town cause.

Its effect in a
country cause.

This writ is of equal force in a country cause as it is in a town cause, where the bill is filed in Michaelmas or Easter terms, but in the two issuable terms the practice is otherwise; for in these terms, if the plaintiff at law has so far proceeded in his action as that he can join issue therein, in that case he is permitted to go to trial at the following assizes, and the injunction only stays judgment and execution; but though this is the ordinary practice of the court, cases do occasionally occur (especially in matters of title * and discovery) where the court will restrain the trial at law till after answer.

Difference between a town
cause and a
country cause.

The residence of the defendant usually regulates the proceedings of the cause, which, in common acceptation, either becomes a town cause or a country cause, according to the place in which the defendant resides; and hence it is that the rules adapted to causes arising in town or country govern their respective proceedings. But where a defendant resides partly in London, and partly in the

* *Hill and Wife v. Price, in Scac.* Sittings after
Trin. term, 1789.
coun-

country, in that case reference is to be had to the place where the subject matter of the cause arises, as in the case of Sir *James Lowther v. The Duke of Portland*, in this court, in which the court said, that as the subject of the cause arose in the country, though the defendant was then resident at his house in London, the cause shall be deemed a country cause.

But though the cause of the action at law may arise in the country, yet by laying the *venue* in London or Middlesex, it gives that relation to the cause in equity as to constitute it a town cause; and hence it becomes necessary to enquire, after an injunction is obtained in an issuable term, whether the *venue* be laid in town or in the country; if in London or Middlesex all proceedings at law are of course stayed, as in a town cause, and the plaintiff at law cannot proceed to trial.

A cause arising in the country may become a town cause by laying the *venue* in London or Middlesex.

Where a defendant appears and answers within the time prescribed by the rules of the court, an injunction to stay proceedings at law can then only be obtained by the several ways following: 1st,

How an injunction is obtained after a defendant has appeared and answered in time.

S 3

upon

upon the insufficiency of the defendant's answer, and this may be, upon opening a material exception taken to the answer, or by setting down the exceptions to be argued in the ordinary way; or, 2dly, the injunction may be moved for upon the merits, as confessed in the answer. Where an injunction is moved for upon opening a material exception, and that exception shall be held immaterial, or shall appear to be answered, the plaintiff cannot then go upon any of the other exceptions; but where the exceptions are set down to be argued, the plaintiff may proceed to argue all the exceptions, and if one of them be allowed, an injunction is then moved for as of course.

Upon the insufficiency of the answer.

Where an answer to an injunction bill is found insufficient, the plaintiff may immediately file exceptions thereto, and give the following notice of motion to the defendant's clerk in court.

In the Exchequer.

Notice of motion for an injunction upon opening a material exception or merits.

Take notice that this honourable court will be moved on _____ next, or so soon after as counsel can be heard, that
an

an injunction may issue upon opening a material exception to the defendant's answer; or in case the exception shall not be held material, then that an injunction may issue upon the merits.

Dated this day of 1795.

J. S. plaintiff's solicitor.

Where the court orders an injunction Upon the merits. upon the merits, it is always continued till the final hearing of the cause; but if the case involves matters of account, and it is uncertain on which side a balance may be found, the court sometimes orders an injunction, upon the parties consenting to go immediately before the master, and let the account be taken between them without delay.

This proceeding, though grounded upon an interlocutory order, has all the effect of a decree to account without the expence of it. The account is as open to be investigated by both parties as after the hearing of the cause, and they may exhibit interrogatories before the master for the examination of each other, or their witnesses; the same power being

S 4 given

given to him to take the account under this interlocutory order as under a decree. Either party may pursue the account so as to obtain the master's report upon it, and when that is made, the cause is set down to be heard thereon in the general paper of causes, under the class of reports for the final decision of the court.

Injunction till
the hearing.

George, &c. To *C. D.* and to all and singular your counsellors, attornies, solicitors, and agents, greeting; whereas *A. B.* complainant hath lately exhibited his bill before the Chancellor and Barons of our court of Exchequer at Westminster, against you the said *C. D.* defendant, praying relief touching the matters therein mentioned: And whereas by an order of the said court, made in the said cause, on the day of it was ordered that an injunction should issue, under the seal of our said court, to restrain (*here insert the words of the order*), until the hearing of this cause, or until our said court shall make further order thereupon; We therefore firmly injoin and command you, and every of you, that from and immediately after your receipt or notice of this our writ, by you or any of you
had,

had, you or any of you do not commence, or further prosecute, any action, suit, bill, or plaint, or enter any judgment, or sue out or levy any execution, in any of our courts at the common law, against *A. B.* touching any of the matters contained in his said bill of complaint, but that you and every of you do, from henceforth, wholly and entirely surcease and desist from the commencing or further prosecuting any such action, suit, bill, or plaint, and from entering any such judgment, and suing out or levying any such execution, until our said court shall have made further order in this cause to the contrary; and hereof you are not to fail on pain of 500*l.* which we will cause to be levied on your goods and chattels, lands and tenements, to our use, if you neglect to obey this our command. Witness, &c. the day of in the year of our reign. By order of court made the same day, and by the Barons.

Elit.

Where exceptions are filed generally, and out of which a material exception
 bath

Injunction granted upon allowing exceptions generally.

hath not been selected, as before mentioned, a rule of four days is given to argue these exceptions, one day inclusive, the other exclusive, on the first Tuesday, Wednesday, or Friday, in term, on which such rule shall expire; and if one or more exceptions are allowed, it is a motion of course, upon the allowance of the exceptions, to apply for an injunction immediately, which will continue until the exceptions are fully answered. (*See the general rule of the court, of the 7th of May, 1794, touching arguing exceptions, under title Exceptions.*)

Or upon submission to answer them.

If a defendant submits to answer exceptions, he must signify his submission to the adverse clerk in court two days previous to the day of argument; and upon suggesting to the court, that the defendant hath submitted to answer the exceptions, an injunction is granted of course until answer and further order.

Or upon overruling the defendant's plea or demurrer.

As a defendant may plead to part of a plaintiff's bill, so he may demur to other part thereof, and answer the residue; and if, upon the argument of the plea or demurrer, either of them should be

be overruled, the plaintiff will be intitled of course to move for his injunction upon that suggestion. And if both the plea and demurrer should be allowed, some equity may be shewn for granting or continuing an injunction, arising out of the defendant's answer put in with such plea and demurrer.

A defendant put in a demurrer, plea, and answer, to an injunction bill; the demurrer and plea being argued, the demurrer was overruled, and the plea ordered to stand for an answer, with liberty to the plaintiff to except to so much of the answer as he should be advised, and an injunction ordered upon the merits confessed in the answer. *Mansfield v. Cook*, 12th May, 1788, in *Scac.*

Demurrer, plea, and answer, injunction ordered upon the merits.

A demurrer being considered as a dilatory proceeding, is required to be filed within eight days from the day the bill is delivered over to the defendant's clerk in court, in which case a plaintiff is at liberty to apply to the court to appoint a short day for arguing it, and the court usually appoints the argument in three

Injunction granted upon overruling a demurrer.

three days after; but if a plaintiff neglects to avail himself of this order, a rule is given by the defendant's clerk in court to argue the demurrer on the Wednesday seven-night following; and if the demurrer should be overruled, the plaintiff may immediately move for his injunction, which will be ordered to continue till answer and further order.

Injunction may be granted for want of a plea or demurrer, being set down to be argued pursuant to the rule.

Where a plea or demurrer is filed, and a rule is given to argue them, and they are omitted, or neglected to be set down for argument, or if set down for argument they should be abandoned by the defendant's counsel, at the time they are called on to be argued, the plaintiff's counsel may then move, that the plea or demurrer may stand overruled; this will be ordered of course, and an injunction granted upon that suggestion until answer and further order.

Injunction to stay proceedings at law, how served.

This writ is served by delivering a true copy of it to the defendant and his attorney in the action at law, and at the same time shewing the original writ under seal.

All other writs of injunction must in like manner be served upon the parties, who are thereby restrained from doing or committing certain acts therein mentioned; and whatever they do, or suffer to be done, in breach of such injunction, is deemed a contempt of the authority of the court, and punishable accordingly.

Other writs of injunction, how served.

Injunction.

Injunction to Stay Waste.

Its origin.

By the common law a prohibition went out of *Chancery* against tenant, by the courtesy, in dower, or as guardian, at the prayer of him who had the inheritance, to inhibit waste, and that before waste committed. 2 *Inst.* 299.

The persons
against whom it
shall issue.

So now an injunction shall be granted, upon an affidavit of waste committed, to inhibit any waste to be committed by tenant for life or years. *Prac. Reg.* 212, 213.

To what it shall
extend to re-
strain waste.

Or to inhibit meadow or other pasture, not ploughed within twenty years, being ploughed. 1 *Ch. R.* 14, 189. *Prac. Reg.* 212.

So to inhibit antient inclosures being thrown down. *Prac. Reg.* 212.

Or houses being pulled down. 2 *Ca. Ch.* 32. *Prac. Reg.* 212.

And

And it shall be granted also against tenant, after possibility, &c. if he pulls down the seat, &c. 2 *Ca. Ch.* 32.

Or against him who, in respect of a trust, &c. is not liable to an action of waste. *Ibid.*

If lands are limited to *A.* for life, to trustees to preserve, &c. to first, &c. sons of *A.* in tail, remainder to *B.* for life, to his first, &c. sons in tail, reversion in fee to *A.* the court will grant injunction, at the suit of *B.* (though he has not the immediate remainder) to stay *A.* from cutting timber; or the court will grant an injunction, at the suit of the trustees, to preserve, &c. *Perrot v. Perrot*, T. 1744. 3 *Atk.* 94.

If a father devises lands to his son and his heirs, but if he dies before twenty-one, without issue, to his daughters, and directs in that case the lands to be sold, and the money divided among them, the court will grant injunction to prevent cutting timber till the son is of age; for, till of age, he shall be considered as trustee of the inheritance for the benefit of

of the daughters. *Robinson v. Litton*,
M. 1744. 3 *Atk.* 209.

Where the defendant had a piece of water supplied by the same stream from which a mill was supplied, and sometimes kept back the water, and at other times let it in, in such quantities, that the mill was overflowed; an injunction was granted to restrain him from preventing it flowing in regular quantities. 1 *Ch. Ca.* 574.

The court will grant an injunction to restrain tenant for life, *without impeachment of waste*, from cutting down trees in lines, or avenues, or ridings in a park, whether planted or growing naturally, or trees not of a proper growth to be cut. *Packington's case*, P. 1745. 3 *Atk.* 215.

So also to restrain him from defacing the mansion-house; and not only so, but will oblige him to put it in the same plight in which he found it. *Prec. Ch.* 454.

So a widow, tenant for life by a will, with permission by a codicil to cut timber, during her widowhood, at seasonable

able times, shall be restrained by injunction from cutting ornamental or immature timber. 1 *Ca. Ch.* 166.

So if lands be devised to be sold, and other lands to be purchased, in which *A.* shall be tenant for life, without impeachment of waste, the rents and profits of the estates to be sold to be to the use of the persons who would be intitled to those of the estates to be purchased; the tenant for life cannot cut down timber on the land to be sold. *Ibid.* 159.

The court will grant an injunction to stay waste, at the suit of the ground-landlord against an under-lessee, who holds by lease from the original lessee. *Tarrant v. Lovel, H.* 1750. 3 *Atk.* 723.

Or against a tenant for life at the suit of the remainder-man in fee, though there is an intermediate remainder. *Ibid.*

Or against a mortgagee in fee in possession for cutting timber, if he does not apply the money in sinking principal and interest. So against a mortgagee for years. *Ibid.*

Against a mortgagee in fee in possession.

Against a mort-
gagor.

This court granted an injunction against a mortgagor from committing waste upon the mortgaged premises. *Pitman v. Hodges*, 29th April, 1784, in *Scac.*

N. B. The court at first hesitated whether this injunction ought to be granted or not, upon the common principle which courts of equity grant injunctions to stay waste. The application being new in this court, Mr. *Mitford* was asked, as *amicus curiæ*, whether he had ever known a motion of this kind in the court of Chancery? To which he answered, that an injunction of this sort had been granted by the court of Chancery, and that an attachment had issued for a breach of it.

If tenant for life, without impeachment of waste, has cut timber, so as not to leave sufficient for repairs, the court will restrain him from cutting any more without leave of the court. *Aston v. Aston*, T. 1749. 1 *Vez.* 264.

The court will grant an injunction, on a forcible entry, against commissioners of turnpike digging gravel in land leased for

for 21 years, and turned into a garden, whereof the plaintiff has been three years in possession. *Hughes v. Morden's Coll.* M. 1748. 1 *Vez.* 188.

To restrain rector from cutting timber in the church-yard till hearing, except for repairing parsonage-house, outhouses, chancel, or pews. *Stareby v. Francis,* M. 1741. 2 *Atk.* 217.

But it shall not be granted against him who has the inheritance, unless he be only a trustee, or in such like special case. *Prac. Reg.* 212.

In what cases
not granted.

Nor against him who has an estate dispunishable of waste. *Prac. Reg.* 212. *Contra* if he pulls down the antient and capital house, &c. *per Chancellor.* 2 *Ca. Ch.* 32. 1 *Salk.* 161. 1 *Ch. R. E. of Oxford,* 10. 1 *Ver.* 23.

Nor against a lessee who had agreed to pay 20s. an acre, *per annum*, increase of rent. 2 *Vern.* 119.

Yet if a lessee, without impeachment of waste, about the end of his term,

intends to cut down all the trees, &c. an injunction shall go, for that is contrary to the public good. *R. 1 Rol. 380, l. 5.*

But nobody can sue in equity against a lessee, without impeachment of waste, for damages for pulling down houses, or cutting down trees. *1 Rol. 379, T.*

Although he avers that there was an agreement that the party should not commit voluntary waste; for there cannot be an averment contrary to a deed. *R. 1 Rol. 379, l. 40.*

In a special case, on a particular right, the court will not grant an injunction before answer. *Attorney-Gen. v. Doughty, T. 1752. 2 Vez. 453.*

Nor against digging mines, where defendant claims the inheritance.

The court will not grant an injunction to stay digging mines, where the defendant claims the inheritance, till the answer is come in, or defendant in default; but if he has only a term for years or life, and the reversion is in the plaintiff, will grant it before answer. *Lowther v. Stamper, P. 1747. 3 Atk. 496.*

On

On motion to stay waste, a particular title must be shewn. 1 *Ca. Ch.* 57.

This court will grant an injunction to stay waste upon filing the bill, and an affidavit of the nature of the plaintiff's title, and of the waste committed, or threatened to be committed, whether the waste respects land, woods, or houses, by felling timber, or other trees, destroying or defacing buildings, digging mines, or the committing any other kind of waste whatever; and in order to obtain this injunction, the service of the *subpœna* is dispensed with until the injunction is granted. On moving for the writ the record of the bill is usually brought into court, which must state the title of the plaintiff to the object of the injunction, and the other necessary facts stated in the affidavit. And this injunction will be granted until answer and further order.

Injunction to stay waste, in what manner obtained.

George, &c. To *A. B.* and to all and every of your tenants, servants, assigns, and agents, whatsoever, and to every of you, greeting; whereas *J. S.* hath lately exhibited his English bill before the

The form of the writ.

Chancellor and Barons of our Exchequer at Westminster, against you the said *A. B.*, touching or concerning the manor or lordship of *T.* in the county of *H.* and (amongst other things) touching divers rights and privileges to the said *J. S.* belonging in the several townships of *C.* and *D.* in the said county, as lord of the said manor or lordship, and for quieting the said *J. S.* in the possession of the said premises: And whereas you the said *A. B.* hath appeared to the said bill, but in delay of the proceedings of the said *J. S.* hath issued a commission to take your answer to the said bill in the country: Wherefore for certain reasons, the Barons of our said court of Exchequer thereunto moving, we command and firmly injoin you, and every of you, by these presents, that neither you, nor any of you, do for the future, after the receipt of this our writ, or a true copy thereof, fell, cut down, or grub up, any timber, trees, wood, or underwood, whatsoever, standing or growing in and upon the wastes or commons of *C.* and *D.* aforesaid, or any of them, within the said manor or lordship of *T.* but that you, and every one of you, do entirely
fur-

surcease and desist from the felling, cutting down, or grubbing up, of any such timber, trees, wood, or underwood, as aforesaid, in the said wastes or commons; and that you, and every of you, do, from henceforth, permit and suffer the said *J. S.* peaceably and quietly to have and enjoy the possession of the said manor or lordship, together with the rights, royalties, and privileges, in the said several townships of *C.* and *D.* belonging to the said manor or lordship, and all other the premises in the said bill mentioned, as the said *J. S.* and his tenants of the said manor or lordship, have or had at the time of exhibiting the said bill, and for three years before, and until you the said *A. B.* shall have fully answered the said bill, and our said court shall have made further order thereupon. Witness, &c. the day of
in the year of our reign. By order
of court made the same day, and by the
Barons.

Eliot.

This writ is served by delivering a true copy thereof to the defendant personally, and also to such tenants, occupiers,

Service of this injunction.

piers, and workmen, as are intended to be restrained from committing the waste complained of, shewing at the same time to each of them the original writ.

The continu-
ance of this
injunction.

This injunction will of course be continued until the defendant hath answered the bill, when he may move to dissolve it unless cause. The same proceedings as to the dissolving or continuing the injunctions will then obtain upon it, as respects injunctions to stay proceedings at law in ordinary cases.

In what case
continued after
answer.

But if a defendant admits, by his answer, that he has done waste before filing the bill, though he swears he has done none since, the court will not dissolve the injunction. *Anon, P. 1747. 3 Atk. 483.*

Injunc-

*Injunction to Quiet Possession before
Hearing.*

COURTS of equity have jurisdiction Injunction to quiet possession. to quiet men in their possessions*, and therefore sometimes in ordinary cases grant injunctions to quiet them before hearing to a party having possession; as when a party hath been in possession three years, and another disturbs him in such possession, this court † will grant an injunction to quiet him in it.

In this case a short bill is filed, and In what manner obtained. an affidavit made, setting forth, that the plaintiff had been in the actual, quiet, and peaceable possession of the premises for three years at least before the filing of the bill, saving the disturbances given by the defendant; that his title is still in being and undetermined; and the force must be particularly sworn to, as well as

* Stat. 4 & 5 Ann, ch. 16.

† By Coke, Ch. J. 3 Bulstr. 34. Lit. Rep. 166. Roll. Rep. 190.

the

the possession; and upon such affidavit the plaintiff may move for an injunction without notice to the opposite party, and the court will either grant an injunction in the first instance, or will make an order upon the party to shew cause why an injunction should not issue according to the circumstances of the case.

May be moved
for before
subpæna.

It was said by Mr. Baron Price, and so admitted *per curiam*, that if a bill be filed to quiet the plaintiff in possession, &c. upon an affidavit of disturbance, and the bill being filed, the plaintiff may come before service of the *subpæna*, and move for an injunction to quiet him in such possession as he had at the time of filing the bill. *Bunb. 110. Pearce v. Penrose, et al. in Scac.*

And to conti-
nue till the
hearing.

Sometimes pending the suit the court will order the party possession by injunction, or that rents not already paid shall be stayed in the tenants hands till the hearing, and sometimes will order both; at other times will order a receiver of the rents and profits, and pay them into court.

George,

George, &c. To the Sheriff of the county of *greeting;*
 whereas J. S. hath exhibited his bill before the Chancellor and Barons of our court of Exchequer at Westminster, against A. B. praying to be relieved as to the several matters therein mentioned, and particularly touching, &c. (*here state the prayer of the bill as the ground of the injunction*): We therefore command and strictly injoin you, that immediately after your receipt of this our writ, you omit not, by reason of any liberty, but enter the same, and go to the said messuages, tenements, and lands, and forthwith remove, or cause to be removed, the said A. B. his tenants or assigns, from the possession thereof, and every part thereof; and put, or cause to be put, the said J. S. or those he shall appoint, into the possession thereof, and of every part thereof. Witness, &c. By order of court made the same day, and by the Barons.

Form of this
injunction,

Eliot.

A trustee having contracted to sell an estate to one person, and the *cestui que* trust having actually sold it to another, who

Injunction only
to be granted
where the
plaintiff has
been three years
in

in possession
before bill filed,
and upon an
undetermined
title.

who moved for an injunction to quiet him in the possession, being disturbed by the trustee: It was held by *Lord Keeper*, that an injunction for quieting the possession is only grantable where the plaintiff has been in possession for the space of three years before the bill exhibited upon a title yet undetermined; or in case the cause hath been heard, and judgment passed upon the merits of the case by the court. *Lady Paines case*, 1 *Vern.* 156.

Injunc-

Injunction Perpetual.

TO yield up, quiet, continue, or restore, possession of lands, &c. after hearing, and herein of perpetual injunctions.

This injunction is a judicial writ, and subsequent to a decree, being in nature of a writ of execution, or *habere facias possessionem* at the common law.

Injunction,
what.

George, &c. To John Greenwood, and to all and singular your doctors in the civil law, procurators, advocates, counsellors, attorneys, solicitors, and agents, greeting; whereas you the said J. G. did, in *Michaelmas* term, in the twelfth year of our reign, exhibit a bill of complaint before the Chancellor and Barons of our court of Exchequer at Westminster, against George Stinton, doctor in divinity, R. S. C. D. and E. F. thereby setting forth the following agreement: "18th July, 1771. An agreement then made between the Rev. George Stinton, doctor

The form of
this writ,
which issued in
Greenwood v.
Jacobs, 14th
Dec. 16 Geo. 3.

in

in divinity, rector of *Newington*, with its appurtenances, concerning the rent of the tithes thereof, with the several persons whose names are hereto set" (*then followed the agreement with each person to the end of it*): And whereas by a decree made by the Barons of our said court, on the 14th day of November last, in the said cause, and also in a cause between *Francis Jacob, and J. L. W. K. and W. B. plaintiffs, and you the said J. G. and others defendants*; it is (amongst other things) ordered and decreed, that an injunction should be awarded to restrain you the said *J. G.* from commencing any action at law, or otherwise prosecuting or suing the said occupiers, or any of them, for tithes in kind under the said agreement: We do therefore, in execution of the said decree, hereby firmly injoin and command you, and every of you, that from and immediately after your receipt of this our writ, or notice thereof, by you or any of you had, you or any of you do not institute any suit, or begin or prosecute any citation, libel, or other process or sentence thereupon, in any of our ecclesiastical courts, or any action, bill, plaint, or execution, at common

mon law, against the said occupiers, or any of them, touching or concerning the payment of tithes under the afore-said agreement; and hereof you are not to fail, under the penalty of 500*l.* which, if you neglect to obey this our command, we shall cause to be levied to our use out of your goods and chattels, lands and tenements. Witness Sir J. S. Kt. at Westminster, the 14th day of December, in the 16th year of our reign. By the said decree, and by the Barons.

Hervey.

1. A perpetual injunction was ordered by this court after five ejectments, three non-suits and two verdicts, and two bills in equity dismissed. *Barefoot v. Fry*, 20th Feb. 1723, in Scac.

A perpetual injunction, in what cases ordered.

2. Against proving a will in the spiritual court, the same being found on a trial to be no will. *Chan. Ca. 80.*

3. To stay action at law of several persons, where the right had been tried and determined by one trial. *Vern. Rep. 266.*

4. On

4. On a bill taken *pro confesso*, by reason of the defendant's contempt in standing out all process; if the same prays an injunction to quiet possession; or to stay proceedings at law, the court will decree a perpetual one.

5. After two * verdicts on trials † at bar, in favour of the plaintiff's title, a perpetual injunction ‡ was decreed, that his right might be quieted in § ejectments, as it was in real actions where verdict was final; and this was affirmed in the house of Lords ¶; the bill for this purpose is a bill of peace ¶.

* 2 Vern. 401.

† There had been several country verdicts to the contrary, but the trials at bar were last.

‡ This injunction operates to quiet the possession of the plaintiff and his heirs for ever, and all persons claiming by, from, or under, him; and it is granted upon a plain, equitable title. *Gilb. Hist. Chanc.* 195.

§ Party is always at liberty to bring a new ejectment at law.

¶ *Lord Bath v. Sherwin. Leighton v. Leighton. Stra. Rep.* 404. *P. Wms. Rep.* 671.

¶ *P. Wms. Rep.* 673.

6. Granted

6. Granted against a bond of fifty years standing. *Ca. Cb. temp. Finch, E. of Nottingham, fo. 77.*

7. May be obtained on a decree for the performance of trusts. *2 Vez. 90.*

8. Perpetual injunction will the rather be granted when the court directs trial, or where the cause against which verdicts are found is odious in its nature. *P. W. Rep. 673.*

9. Acceptance of bills of Exchange becoming void by the law of a foreign country, and the same having been vacated by the sentence of a competent court there, and party discharged therefrom, in consequence thereof, a perpetual injunction granted against all proceedings here. *Mos. Rep. 1, 69, 72. Vin. Abr. 87. Pl. 9. 2 Eq. Ca. Abr. 476. Pl. 2, 524. Pl. 7.*

10. The court having declared in this case that the notes in question were put in suit against good conscience, and that the plaintiff was intitled to relief against them, decreed the value of them to be

VOL. I. U repaid,

repaid, and ordered a perpetual injunction to prevent the indorsement and further negotiation of them. *Cbennel v. Churchman*, 22d Feb. 1776, in *Scac.*

N. B. This case was cited in *Ryan v. Macmath*, *Brown Ch. R. T. T.* 1789, and relief was refused in that case; yet it was granted afterwards in *Mich. T.* 1794, per *Lord Loughborough*, *C.* and the case of *Ryan v. Macmath* was overruled, and the principal laid down in *Cbennel v. Churchman* was confirmed.

Perpetual injunction on a bill taken *pro confesso*.

George, &c. To *C. D.* and to all and singular your counsellors, attornies, and solicitors, greeting; whereas *A. B.* hath lately exhibited his bill of complaint before the Chancellor and Barons of our Exchequer at Westminster, against you the said *C. D.* defendant, for relief (amongst other things) touching an action at law lately commenced by you the said *C. D.* against him the said *A. B.* as executor of one *E. F.* for the matters in the said bill mentioned: And whereas you the said *C. D.* have not yet answered the said bill, but are in contempt for not so doing, and all our processes of contempt

tempt have issued against you for want of your said answer: And whereas by a decreetal order made by the Barons of our said court, on the day of reciting that a commission of sequestration had issued for seizing and sequestering your real and personal estates for your said contempt, and had been returned into our said court, and that an order had been made for the said cause to be put in the paper of causes, to be heard upon the said sequestration so returned: It was thereupon ordered and decreed by our said court, amongst other things, that the bill of complaint of the said complainant should be taken and deemed as confessed by you the said defendant; and that an injunction should issue, under the seal of our said court, to restrain you, the said defendant, from proceeding any further against the said *A. B.* in the said action at law, touching the matters in the said bill mentioned: We do therefore, in execution of the said decreetal order, hereby firmly injoin and command you, and every of you, that from and immediately after your receipt of this our writ, or notice thereof, by you or any of you had, you or any of you do

U 2

not

not prosecute the said *A. B.* any further in the said action at law, touching all or any of the matters in the said bill of complaint mentioned; but that you, and every of you, do from henceforth entirely surcease and desist from any further proceeding against the said *A. B.* in the said action at law, and from entering up judgment, or suing out or levying any execution thereupon; and this you shall in no wise omit, &c. Witness, &c. By the said decreetal order, and by the Barons.

*Eliot.**Injunc-*

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*Injunction against committing
Nuisances.*

CCOURTS of equity will grant an injunction for a plain apparent nuisance, before answer on an affidavit, and notice of the motion; but in the case of a special nuisance, the court expects a plaintiff to shew his right, and how he is particularly aggrieved, before this injunction will be granted.

*Injunction to
restrain the con-
tinuance of a
nuisance.*

The form of this writ must necessarily depend upon the nature of the nuisance intended to be restrained; and in framing it, the precise restrictive words of the order granting it must be used, and no other.

*Form of this
injunction.*

The court grants this injunction to restrain such nuisances only as are so at law, not such as fear (though reasonable) deems such, as an innoculating hospital. *Anon. Mich. 1752. 3 Atk. 750. N.B.* In this case Lord Hardwicke held, that the proper mode to abate a public nuisance is

*In what case
this writ is
granted, and in
what not.*

by information in the name of the Attorney-General.

Information by the Attorney-General, for a nuisance in Portsmouth harbour, decreed to be removed.

An information was exhibited by the Attorney-General against the defendants for a nuisance in *Portsmouth* harbour, and to restrain them from making certain erections and buildings upon a piece of ground between high and low water mark, by which his Majesty's ships were obstructed from entering into, and mooring in, the harbour; and praying that the nuisance may be abated and removed, and the harbour restored to its antient condition; and after a hearing of several days, the court declared the right of the soil to be in the crown, and directed the erections to be removed at the expence of the defendants. *Liber decret. in Scac. Trin. T. 1795.*

The court will not grant an injunction to restrain a person from committing a common trespass, but if it continues so long as to become a nuisance it will, *Coulson v. White, Hil. 1743. 3 Atk. 21.*

Injunc-

*Injunction to prevent Multiplicity
of Suits, and herein by Bill of
Interpleader, &c.*

IN order to prevent multiplicity of suits, the court will direct, that a verdict in one shall determine them all, and an injunction to issue in the mean time. *Gilb. Chanc. 195.*

Injunction to prevent multiplicity of suits.

So where a plaintiff exhibits separate bills against several defendants, for one and the same demand, and the bills, as against the respective defendants, are in form and substance the same, so that the matter in dispute between the parties might be determined in one suit; In order to prevent a multiplicity of suits, and thereby save the expences consequent thereon to all parties, the court will make an order, in nature of an injunction, that the bills be consolidated, and made one cause, upon the defendant's undertaking to join and put in one answer to such bills; and will further order, that the costs occasioned to the defendants,

By consolidating several suits into one.

dants, by appearing to, and taking office copies of, the bills, be reserved until the hearing. (*Vide Consolidation of Suits.*)

Injunction,
how obtained
upon a bill of
interpleader.

Where a third person exhibits a bill of interpleader against two or more claimants of a sum of money in his hands, or of his rent, and prays an injunction to restrain their proceedings at law, and in the mean time that they may interplead, so that the court may judge to whom the money or rent belongs, the plaintiff must first pay the money into court; and upon producing the certificate of the Deputy Remembrancer, that the money is paid into court, it is a motion of course to grant the injunction.

Injunc-

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Injunction to restrain one Defendant from proceeding at Law against another Defendant.

BILL brought for an injunction to restrain a defendant from proceeding at law against the plaintiff, for the recovery of 350*l.* upon a bill of Exchange drawn by the plaintiff upon, and accepted by, another defendant; and praying that the injunction might extend to stay the first-named defendant, and also other defendants named in the bill, from proceeding at law against the defendant, the acceptor of the bill of Exchange. The court ordered an injunction until answer and further order.

Kelly v. Collins, 29th June, 1769, in Scac.

Injunction to restrain one defendant from proceeding at law against another.

Plaintiffs, as under-writers, exhibited their bill in this court against three defendants, viz. *Abraham Le Mesurier, Solomon Langa, and Thomas Mansell*, amongst other things, to restrain them by injunction from proceeding in the several actions brought by the defendant

Injunction granted to restrain one defendant from proceeding at law till the other two had answered.

Le

Le Mesurier in his name, but on the account, and for the use and benefit, of the other defendants *Langa* and *Mansell*, and from commencing any further actions against the plaintiffs on account of the policy of insurance in question. The defendant *Le Mesurier* put in his answer; but the defendants *Langa* and *Mansell*, who resided in the island of *Guernsey*, appeared; but were in contempt for want of their answer. It was moved by Mr. *Kenyon*, upon the affidavit of *Bruce*, one of the plaintiffs, that as the answers of these two defendants were necessary to support the plaintiffs case at law, an injunction might issue to stay the trial of the actions brought by the defendant *Le Mesurier*, until the other defendants had answered; upon which the court ordered an injunction till *Langa* and *Mansell* had answered the bill. *Bruce and others v. Le Mesurier and others*, 14th June, 1780, in *Scac.*

Injunction as to two defendants, and against a third, to restrain him from proceeding in the names of the other two defendants.

George, &c. To *Abraham Le Mesurier, Solomon Langa, and Thomas Mansell*, and to all and singular your counsellors, attornies, solicitors, and agents, greeting; for certain causes, the Barons of our

Ex-

Exchequer at Westminster at present thereunto moving, we direct, and with strict injunction command, you the said *S. L.* and *T. M.* and all and singular your counsellors, attornies, solicitors, and agents, that from and immediately after your receipt of this our writ, or notice thereof, by you or any of you had, you do not commence, or further prosecute, any action, suit, bill, or plaint, already commenced, in any of our courts at the common law, against *R. B. C. D. E. T.* and *T. G.* any or either of them, touching, or in any wise concerning, any of the matters or things contained or specified in a certain bill of complaint, by them the said *R. B. &c.* exhibited in our said court of Exchequer against you the said *S. L. T. M.* and *A. Le M.* but that ye, and every one of you, do entirely surcease and desist from the commencing, or further prosecuting, any such action, suit, bill, or plaint, until you the said *S. L.* and *T. M.* shall have fully answered the said bill, and our said court shall have made further order herein to the contrary: And we also direct, and with strict injunction command, you the said *A. Le M.* and all and singular your counsellors,

fellors, attornies, solicitors, and agents, that from and immediately after your receipt of this our writ, or notice thereof, by you or any of you had, ye or any of you do not commence, or further prosecute, any action, suit, bill, or plaint, already commenced, in any of our courts at the common law *in your name, but on the account and benefit of the said S. L. and T. M. against the said R. B. &c.* or any or either of them, touching, or in any wise concerning, any of the matters or things contained or specified in the aforesaid bill of complaint, by the said *R. B. &c.* lately exhibited in our said court of Exchequer against you the said *A. Le M.* and the said *S. L. and T. M.* but that ye, and every one of you, entirely surcease and desist from the commencing, or further prosecuting, any such action, suit, bill, or plaint, until you the said *S. L. and T. M.* shall have fully answered the said bill, and our said court shall have made further order herein to the contrary: And in this ye, nor any of you, are not by any means to fail, under the penalty of 500*l.* &c. Witness, &c.

*Eliot.**Injunc-*

*Injunction to restrain Building by
stopping up Ancient Lights.*

A Court of equity will instantly in-
terpose, by injunction, to stay
building which will stop up ancient lights
by prescription or agreement; but the
allegation that the building will stop
them up must be suggested by the bill.
Morris v. Lord Berkley. T. 1752.
2 Vez. 452. Gilb. Hist. Chan. 193,
194.

*Injunction to
restrain the
stopping of an-
cient lights.*

This injunction is granted upon notice,
and an affidavit verifying the allegations
of the bill, and to continue till answer
and further order.

*In what man-
ner obtained.*

The form of this writ must be framed
according to the precise words of the
order of the court which grants it.

*Form of the
writ.*

The court will grant an injunction to
stop a building in London, which ob-
structs

*In what case
granted.*

structs lights, till the right is tried at law, and order the scaffolds and boards to be pulled down. *Ryder v. Bentham.* T. 1750. * *Vez.* 543.

A injunction may be continued after the answer comes in, on affidavits of the plaintiff that would accrue on dissolving it. *Grove v. Cole.* 11 W. 3. 11.

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Injunction to restrain the Infringement of Patents, and herein from copying, engraving, &c. and selling Prints, and from printing or vending printed Copies of Books, &c.

A Court of equity will grant an in- In what cases granted.
junction on a patent for printing almanacks to restrain printing the same, but not till the patent has been produced in open court under the broad seal. *Gillb. Hist. Chan.* 194.

An injunction shall be granted to in- To restrain the printing of books of common law.
hibit the defendant from printing books of common law, the sole privilege of which, by patent, is granted to the plaintiff, if the defendant be in contempt for not answering. *2 Ca. Ch.* 67, 76, 93.

An injunction may be continued after the answer comes in, on affidavits of the prejudice that would accrue on dissolving it. *Gibbs v. Cole.* *P.* 1734. *3 P. W.* 255.

The

The court will grant an injunction for a collection of familiar letters as well as other books. There is a distinction between letters wrote *by* a person, and wrote to him. *Pope v. Curl. T. 1740. 2 Atk. 342.*

So though the book has been printed, and printed in *Ireland*, and pretended to be only re-printed here. *Ibid.*

In what cases
denied.

An injunction to inhibit a ship trading to the *East-Indies* was denied, though the owners were in contempt for not answering a bill by the *East-India company*, who have by patent the sole trade there. *2 Ca. Ch. 165.* Denied till the validity of the patent was tried. *1 Vern. 127.*

So if the right be not settled, the court will not grant an injunction to the printing before a trial. *1 Vern. 6, 120, 275.*

The *stat. of 8 Geo. 2, ch. 13*, for the encouragement of engraving, &c. is not confined to works of invention or history, but extends to any new print, as a print of a building, prints of plants represented in

in a different manner than hitherto.
Blackwell v. Harper, M. 1740. 2 Atk. 93.

Books colourably shortened, and where quotations are translated, are within the 8 *Anne, ch. 19*; but fair abridgements are not, for the invention, learning, and judgment of the author are shewn in them. *Giles v. Wilcox, H. 1740. 2 Atk. 141. Bell v. Walker. 1 Brown Ca. Ch. 451.*

The court will not grant an injunction to restrain one tradesman from using another's mark, as a card-maker from using the Mogul stamp. *Blanchard v. Hill, Mich. 1742. 2 Atk. 484.*

George, &c. To *T. C.* and to all and singular your counsellors, attornies, solicitors, workmen, agents, servants, and assigns, greeting; whereas *C. E.* and *W. S.* by their bill of complaint exhibited in our court of Exchequer at Westminster, against you the said *T. C.* have claimed a sole and exclusive right of printing, publishing, and selling, a certain Form of Prayer commanded by us to be used in all churches and chapels

Injunction, on behalf of the King's printers, to restrain a bookseller from printing, &c. a Form of Prayer to be used on a fast-day.

VOL. I. X through-

throughout that part of *Great-Britain* called *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, upon Friday the *4th day of February* next, and have accordingly by our command printed and published many copies of the said Form of Prayer: And whereas by an order of our said court, made in this cause this day, it was ordered, that you the said *T. C.* should be restrained from printing, publishing, or exposing to sale, or causing to be printed, published, sold, or exposed to sale, a certain book or pamphlet intituled (*here insert the whole title verbatim, from A Form of Prayer to the year it is printed, inclusive*), by you the said *T. C.* lately printed, published, and sold, and from printing, publishing, or exposing to sale, the said Form of Prayer so commanded to be used by us as aforesaid, or any copy or copies thereof: We therefore command and strictly injoin you, that upon receipt of this our writ, or notice thereof, by you or any of you had, you or any of you do not print or publish, or cause to be printed or published, any other copy or copies of the said Form of Prayer so by you the said *C. T.* printed and published

as

as aforefaid; and that you or any of you do not fell or expofe to fale, or caufe to be fold or expofed to fale, any copy or copies of the faid book or pamphlet fo by you the faid T. C. printed and published as aforefaid, or of the faid Form of Prayer fo commanded by us to be ufed as aforefaid, until it fhall be otherwife ordered by our faid court of Exchequer; and this you fhall in no wife omit, under the penalty of 500*l.* which, if you neglect this our prefent command, we fhall caufe to be levied to our ufe on your goods and chattels, lands and tenements. Witnefs, &c. By order of court made the fame day, and by the Barons.

Hervey.

*Injunction to Stay Proceedings in
Chancery.*

IF after a plaintiff hath exhibited a bill in this court, the defendant should exhibit another bill against him in the court of Chancery, for the same matters, and it being referred to the Master to report the priority of suit, and to state whether it be for the same matter or not; and it appearing by the report that the bill here was first filed, and that the bill exhibited in the court of Chancery is for one and the same matter as that contained in the bill brought in this court, the court will thereupon grant an injunction to restrain the party from proceeding in his bill in the court of Chancery.

*Injunction to
stay proceedings
in Chancery.*

George, &c. To A. B. &c. greeting;
whereas *J. S.* hath exhibited his English bill before the Chancellor and Barons of our court of Exchequer at Westminster, against you the said *A. B.* praying to be relieved as to the matters in the said bill
con-

contained; and (amongst other things) praying to be admitted to the equity of redemption of several lands and tenements in the parish of *D.* in the county of *E.* by him mortgaged to you the said *A. B.*—And whereas you the said *A. B.* have, since the exhibiting of the said bill, exhibited another bill in our high court of Chancery against the said *J. S.* touching and concerning the same matters as are mentioned and contained in the said bill exhibited in our said court of Exchequer by the said *J. S.* against you the said *A. B.* and are unjustly proceeding upon the said bill so exhibited by you in our said court of Chancery, as is said: We therefore, taking the said premises into consideration, do command and strictly injoin you, and every one of you, by these presents, that neither you or any of you do for the future, after the receipt of this our writ, or a true copy thereof, proceed against the said *J. S.* on the said bill, by you exhibited, as aforesaid, in our said court of Chancery, but that you, and every one of you, do from henceforth wholly surcease and desist from all manner of proceedings whatsoever thereupon, until it shall

be otherwise ordered by our said court of Exchequer; and this you are not to omit, under the penalty of 500*l.* which, if you neglect this our command, we shall cause to be levied to our use out of your goods and chattels, lands and tenements. Witness, &c. By order of court made the same day, and by the Barons.

Eliot.

Injunc-

*Injunction to Stay Proceedings in
the Spiritual Court.*

WHERE a suit is instituted in the spiritual court for tithes, and a *modus* is there set up as a payment and satisfaction for the titheable matter demanded, in that case the spiritual court cannot proceed for want of jurisdiction, but it becomes the province of a court of equity to entertain the suit, and to grant an injunction to stay proceedings in the spiritual court.

Suit for tithes instituted in the spiritual court, and a *modus* set up, an injunction of this court will stay proceedings there.

Bill suggested that there was a *modus* of four-pence *per* score on all sheep going on *Gayerfield*, in the parish of *Ryton*, in the county of *Durham*, in lieu of tithes of lamb and wool; that the defendant libelled in the spiritual court for tithes in kind; that the plaintiff moved for a prohibition in the court of pleas in *Durham*, but permitted a consultation to go, and depended on relief in this court, and prayed to have the *modus* established. The defendant,

Injunction to restrain proceedings in the spiritual court, in what cases granted.

Dr. Finney, insisted there was no such *modus*, but that the four-pence was in lieu of the milk of the ewes, which was usual in that country. Upon motion for an injunction to the spiritual court, the defendant's counsel insisted, that this was proper matter of suggestion on a prohibition, and also the defendant had in the answer denied the *modus*. But, *per curiam*, there being some dispute between the parties, whether the *modus* is as alleged in the bill, and as the spiritual court cannot try the *modus*, we will grant the injunction. *Sir Edw. Blackett v. Dr. Finney, Trin. T. 1724, in Scac. Bunb. 176.*

On bill to establish *modusses* to tithes sued for in the spiritual court.

So where a like bill was filed for establishing *modusses*, some whereof the defendant admitted, but absolutely denied the most and greatest of them; and, *per totam curiam*, though the plaintiff here had not put in a libel to the spiritual court, yet since that court cannot try *modusses*, and the bill prays an establishment thereof, an injunction was granted. *Salmon et al. v. Rake, Trin. T. 1733. Bunb. 176.*

George,

George, &c. To *A. B.* and to all and every your attornies, solicitors, agents, proctors, advocates, and assistants, whatsoever, and to every of you, greeting; we command and strictly injoin you, and every one of you, by these presents, that neither you nor any of you do for the future, after the receipt of this our writ, or a true copy thereof, proceed on any libel, action, suit, citation, sentence, or other matter whatsoever, which you or any of you have commenced, or shall hereafter commence, on any matter or cause whatsoever in the court Christian, before the Right Rev. Father in God *John*, by divine providence Bishop of *Exeter*, or his vicar-general, commissary, surrogate, or other judge in spiritualities whatsoever in that behalf, or otherwise, in any ecclesiastical judge whatsoever against *J. S.* touching or concerning any of the matters or things mentioned or specified in a certain English bill lately exhibited in our court of Exchequer at Westminster by the said *J. S.* against you the said *A. B.* but that you, and every of you, do surcease and desist from the prosecution of all such libels, actions, suits, citations, sentences, and other
mat-

Form of the
injunction.

matters, and from all manner of proceedings whatsoever thereupon, until you the said *A. B.* shall have fully answered the said bill, and our said court shall have made further order herein, admonishing you that, to which of your hands this writ shall first come, you immediately give notice thereof to the other persons named therein, under the forfeiture of 500*l.* which, if you neglect to obey this our present command, we shall cause to be levied to our use out of your goods and chattels, lands and tenements. Witnesses, &c. By order of court made the same day, and by the Barons.

Eliot.

Injunct-

*Injunction to Stay Proceedings in
the Court of Admiralty.*

GEORGE, &c. To *A. B.* and to all The form of
the writ.
and every your attornies, solicitors,
agents, proctors, and advocates what-
soever, greeting; for certain causes, the
Barons of our Exchequer at Westminster
thereunto moving, we command and
strictly injoin you, that on receipt of this
our writ, or notice thereof, by you or any
of you had, you do not institute any suit,
or begin or further prosecute any cita-
tion, libel, or other process or sentence
thereupon, in our high court of Admi-
ralty, against *C. D.* before the Right
Worshipful Sir *James Marriott*, Kt. the
judge of our said court, touching any
of the matters or things contained in a
certain petition or bill by him the said
C. D. exhibited before the Chancellor
and Barons of our said Exchequer, against
you the said *A. B.* but that you, and
every of you, wholly desist from the
several matters aforesaid, and all further
pro-

proceedings thereupon, until you the said *A. B.* shall have fully answered the said bill, and our said court shall have made further order thereupon. Witness, &c. the day of
in the year of our reign. By order
of court made the same day, and by the
Barons.

Eliot,

Injunc-

*Injunction, in what Cases denied
or suspended.*

BY the practice of this court, where In what cases
not granted. a plea or demurrer is filed within eight days, no motion can be made for an injunction, either on the merits, or upon opening a material exception, until the plea or demurrer is disposed of.

An injunction was moved for upon an affidavit of service of a letter missive, and an office-copy of the bill, but was refused. *Per curiam*, an injunction cannot be granted until after service of the *subpœna*, i. e. process under seal of the court. *Steel v. Lady Trevor*, 19th Nov. 1776, in *Scac.*

In like manner if upon filing an injunction bill the defendant obtains an order to refer it for impertinence, the injunction is suspended till the Master shall have made his report thereon.

A bill

Where injunction issued irregularly in this case.

A bill of great length was filed in this court for an injunction, and took up a considerable time in copying. The day before the answer was due, the defendant obtained an order to refer the bill for impertinence; but the clerk in court for the plaintiff, considering this proceeding as intended to prevent an injunction, issued an attachment the next day for want of an answer, and obtained the usual order for the injunction, which was issued. It was now moved to set aside the plaintiff's proceedings, with costs, for irregularity, the order for the injunction having been obtained pending an order of reference for impertinence in the bill. In this case the court were unanimous, that the injunction ought not to have issued until the order of reference was disposed of, and ordered the attachment, order, and injunction, to be set aside, but without costs. *Macnamara v. Kinderley*, 26th Nov. 1784, in *Scat.*

Cause allowed against dissolving an injunction, that the answer stands referred for impertinence.

So where a defendant obtained an order of the 7th of November, to dissolve the injunction upon coming in of his answer unless cause; the plaintiff on the next day obtained an order to refer it for

for impertinence; and on the 14th of November (the day of shewing cause), the plaintiff shewed cause that the answer stood referred for impertinence, which the court allowed; and the injunction was suspended until after the reference was had. *Swayne v. Mills, Trin. T. 1789, in Scac.*

Where an injunction bill is exhibited by a party, who thereby states himself to reside abroad, and out of the jurisdiction of this court, the defendant may give notice to the adverse clerk in court, that all proceedings on the part of the plaintiff may be stayed, until the plaintiff shall have given security to answer costs according to the course of the court; and that the defendant may have eight days time to answer the bill after such security shall be given. The court will make the order accordingly.

Bill for an injunction, by a party resident abroad, cannot issue till security to answer costs is first given.

But if after this notice, and before the motion, the plaintiff's solicitor will immediately deliver over the names and places of abode of two sufficient sureties in 40^l. to answer the costs in the cause, a defendant is not to delay a plaintiff in signi-

Injunction may issue in time, if the security be given within eight days from the defendant's appearance.

signifying his approbation or disapprobation of the proposed security; and if the recognizance is entered into at any time within the eight days allowed the defendant to put in his answer, the plaintiff may, at the expiration of that time, move for an injunction for want of an answer.

To prevent delay to the injunction, security should be proposed at the time the bill is delivered over.

In this place it may be proper to remark, that wherever a party residing abroad files a bill for an injunction, his clerk in court ought to be provided with the names of two sufficient sureties to answer costs, by the return of the *sub-pœna*, that he may propose such security at the time he delivers over the bill to the adverse clerk in court, so that the plaintiff may avoid all inconvenience and delay in applying for his injunction, by rendering the above-mentioned notice unnecessary on the part of a defendant.

Injunc-

On continuing Injunctions.

AN injunction is always continued to Upon the merits. the hearing in those cases where the merits of the plaintiff's bill are confessed by the defendant's answer; and this need not be in the direct terms of an admission, but as it discloses so much of the general equity of the bill as renders it fitting for the court to interpose, either by granting an injunction in the first instance upon the coming in of the answer, or in continuing the injunction which the plaintiff hath already obtained to the hearing. But in the ordinary forms of proceeding, by which a plaintiff obtains an injunction, previous to the consideration of the merits of his case, the injunction only continues till the court shall have decided thereon; as where an injunction is granted upon opening a material exception, the injunction is only continued till a further answer is put in, and the court shall make further order.

On continuing Injunctions.

An injunction is continued till a defendant hath cleared his contempts, nor will his answer be accepted until he hath done so.

In like manner it continues until all the defendants against whom it is prayed, and hath issued, shall have answered the bill, unless upon a special application to the court it shall be otherwise ordered.

On dissolving Injunctions.

WHERE an injunction is obtained either for want of a defendant's appearing or answering in time, upon filing his answer it is a motion of course to dissolve the injunction, unless cause is shewn to the contrary in a week after service of the order, when the plaintiff must either shew exceptions or merits as cause for continuing the injunction; and this must be signified to the adverse clerk in court two days before the day of shewing cause, in order that the defendant may be prepared in case the plaintiff should shew cause upon the merits; but if he shews exceptions for cause, he must obtain an office-copy of the order for dissolving the injunction, upon which his counsel then shews exceptions as cause for continuing the injunction, which is of course allowed till the fate of the exceptions is determined.

On filing answer, it is a motion of course to dissolve the injunction, unless cause.

The exceptions being filed, and the order obtained thereon, they are deli-

Argument of exceptions.

vered over to the adverse clerk in court, with a four days rule to argue them on the first Tuesday, Wednesday, or Friday, next following the date of the rule; but if there should not be so much time left in the term, then the rule for arguing them must be made for the second day of the sittings at Serjeant's-Inn Hall after the term, being the general day appointed by the court for the argument of exceptions, pleas, and demurrers.

N.B. The sittings in equity are always appointed by the court on the last day of every term, except Easter term, when, on account of the shortness of the vacation, the Thursday next after the last day of that term is always fixed as a day for motions *only*.

On shewing
merits for cause.

Where a plaintiff elects to shew cause upon the merits, and it happens he is not fully prepared so to do on the day for shewing cause, it is a motion of course for him to obtain an order to enlarge the time for shewing cause for the space of a week, if in term, undertaking then to shew cause upon the merits; but if at the sittings, the time will

will be enlarged to the first day of the following term.

When exceptions are taken to a defendant's answer put in to an injunction bill, and he is advised the answer is sufficient, a defendant may apply to the court, by a motion of course, for an order (stiled the previous order), by which it is ordered, that in case the exceptions taken to his answer shall, upon the arguing thereof, or otherwise, be overruled, the plaintiff do at the same time shew cause, on the merits, why the injunction should not be absolutely dissolved.

Upon the previous order where exceptions are filed.

This order must be obtained and served at least two days before the day of arguing the exceptions; for if this order is not so obtained, and the exceptions should be overruled, the defendant must either on that day, or afterwards, move for an order to dissolve the injunction upon the exceptions being overruled, unless cause shewn that day seven-night; and if the plaintiff should then shew cause upon the merits, and fail, the injunction will be dissolved; but the defen-

Time of obtaining the previous order.

dant will have suffered the delay of a week, in his proceedings at law, by not obtaining the previous order.

Where neither merits nor exceptions are shewn for the cause, the injunction is dissolved of course.

If, after service of the order for dissolving the injunction, the plaintiff neither shews merits nor exceptions for cause against dissolving it, a defendant need not in that case move the court to make the order absolute. In the terms of it, and by the constant practice of the court, it becomes absolute of course. And here a distinction is to be observed between those orders which are made unless cause, and orders which are made to shew cause; in the first case, unless the party shews cause the order becomes absolute, and is in the nature of a judgment by *nihil dicit*: in the last case, if the party who is directed to shew cause omits to do so, the adverse party must, on the next, or some future, day, move to make the order absolute.

Injunction may be dissolved by the plaintiff becoming a bankrupt, unless a supplemental bill is filed.

Where a plaintiff, in possession of an injunction, becomes a bankrupt, and assignees are chosen, it is a motion of course, that unless his assignees file a supplemental bill within a limited time (usu-

(usually within a fortnight), the injunction may stand dissolved.

So where an injunction becomes abated, By the death of either party. by the death of either party, it is a motion of course, that unless a bill of revivor be filed within a limited time, the injunction will be dissolved.

A joint action at law, was brought in the names of two partners, the one residing in England, the other abroad, and a bill exhibited for an injunction against them, to stay their proceedings at law for the money recovered by verdict. The defendant who resided in England answered the bill, and then moved, on behalf of his co-defendant residing abroad, that the money recovered at law might be brought into court until he had answered the bill, when the court ordered the same, and that unless the money was brought into court within a month, the injunction should be dissolved. *Potts v. Butler, Hil. T. 1787, in Scac.* On not paying money into court, pursuant to order.

On reviving Injunctions.

Injunction dissolved upon the merits in the original cause may be afterwards revived upon an amended bill.

WHERE an injunction has been dissolved in the original cause, and an amended bill is filed, the plaintiff may move, on notice, to revive the injunction upon an attachment, or upon the defendant's praying time to answer; in which case there must be an affidavit stating the amendments; and if the court is of opinion that the amendments are material, they will make an order to revive the injunction.

TO THE COURT OF CHANCERY
IN THE MATTER OF THE
SHEPHERD & CO. v. THE
SHEPHERD & CO.

In the last day of the term the defendant having put in his answer obtained the usual order to dissolve the injunction. In this cause at the sittings which ex-

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*In what Cases a Plaintiff at Law
is permitted to proceed, not-
withstanding the Injunction.*

AS this court can continue, suspend, or finally dissolve, an injunction, as hath been shewn in the several cases before-mentioned, so in the exercise of its jurisdiction upon this subject, cases will sometimes occur where, pending an injunction, the situation of the party at law may be such as to induce the court to permit him to proceed a certain length in his action notwithstanding the injunction, but then this is always done with a stay of execution,

As where a bill was filed in this court, after a verdict at law, in order to be relieved against it, and for an injunction. On the last day of the term, the defendant having put in his answer obtained the usual order to dissolve the injunction, unless cause at the sittings, when excep-
tions

To tax costs and enter up judgment, with a stay of execution.

tions were shewn for cause, but which, by the course of the court, could not be argued until the following term. Mr. *Stanley* now moved, for the defendant, that he might be at liberty in the mean time to tax his costs, and enter up judgment at law, with a stay of execution, notwithstanding the injunction. Mr. *Richards* for the plaintiff opposed this motion, contending, that the injunction ought first to be disposed of before the defendant should be permitted to proceed in his action. But the court held, that this application was perfectly reasonable, and ought to be granted for asking; that by granting it no possible harm could be done to the plaintiff, for if he could sustain an injunction upon the merits of his case, the execution at law must wait the determination of the cause in equity. *Randolph v. Tombs*, 16th Dec. 1785, in *Scac.*

To *non-pros* the writ of error, and affirm the judgment at law.

So where the plaintiff in equity hath brought a writ of error on a judgment at law, the court, upon a motion of course, will grant an order, that the defendant shall be at liberty to proceed to *non-pros* the writ of error, and affirm his judgment, notwithstanding the injunction.

Defence

*Defence to Bills and English
Informations.*

ALL persons capable by *themselves* of instituting a suit, are likewise capable by *themselves* of defending one. If the interest of the crown, or of those for whom it is a trustee, is concerned, the King's Attorney-General, or, during the vacancy of that office, the Solicitor-General, becomes a necessary party to support or defend that interest. The Queen's Attorney or Solicitor-General seems to be the party necessary to support her rights. 2 Roll. Abr. 213. *Infants, idiots, and lunatics*, who are incapable by themselves of instituting a suit, are likewise incapable by themselves of defending one. *Married women*, who cannot by themselves institute a suit, may defend by themselves, separately from their husbands, with the leave of the court. *Infants* institute a suit by their next friends; but, to defend a suit, the court appoints them guardians, who

Persons capable
and incapable by
themselves of
defending a suit.

are

are usually their nearest relations, and not concerned, in point of interest, in the matter in question. If a person, by age or infirmities, be reduced to a second infancy, he may also defend by guardian. *Preced in Chan.* 329. Idiots and lunatics defend by their committees. If a married woman claims, in opposition to any claim by her husband, or if she lives separate from him, *Preced. in Chan.* 329, *Toth.* 75, or disapproves the defence he wishes her to make, 2 *Atk.* 50, she may obtain an order, upon an affidavit stating the facts, to defend the suit separately from her husband.

Defence to bills.

Of the various modes of defence to a bill.

The person against whom a bill is exhibited, being called upon to answer it, may defend himself,

By demurrer.

1. By *demurrer*, by which he appeals to the judgment of the court, whether he shall be compelled to answer the bill or not. *Prac. Reg.* 131.

2. By

2. By *plea*, whereby he shews why the
suit should be dismissed, delayed, or
barred. *Prac. Reg.* 273.

By plea.

3. By *answer*, which, controverting
the case stated by the plaintiff, confesses
and avoids, traverses and denies, the se-
veral parts of the bill; or, admitting the
case made by the bill, submits to the
judgment of the court upon it, or upon
a new case made by the answer, or both.

By answer.

4. By *disclaimer*, which at once ter-
minates the suit, the defendant disclaim-
ing all right in the matter sought by the
bill. *Prac. Reg.* 141.

By disclaimer.

5. By *demurrer*, *plea*, *answer*, and *dis-*
claimer, or by two or more of them,
each of which must relate to separate
and distinct parts of the bill. *Mist. on*
Plead. 98.

By demurrer,
plea, answer,
and disclaimer.

Demur-

Demurrer, when it lies, and when not.

Demurrer,
when it lies,
and when not.

IF a bill be filed, and the defendant appears, he may demur, plead, or answer, otherwise all process shall issue against him as if he had not appeared.

If defendant has demurred to a bill, and his demurrer has been overruled, he cannot demur again to the same bill; but if the bill has been amended, he may then demur again. *2 Brown Ch. Rep. 66.*

The defendant may demur if the bill is for a matter or sum below the dignity of the court, and it will be dismissed; but if there is fraud, or complicated matter, it will be restrained however small. *Per Price, B. M. 1717, in Scac. Bunb. 17.*

If bill is brought for relief against several contracts, for shares of the same stock, bought of the defendant severally, and

and charges that they had formed themselves into a society to carry on the fraud, yet demurrer lies. *N. B.* Defendants must deny combination. *Bull v. Allen*, *H.* 1720, *in Scac.* *Bunb.* 69.

Though defendant does not demur to a bill, as being too trifling for the court to entertain, yet he may take advantage of it at the hearing. *Brace v. Taylor*, *H.* 1741. 2 *Atk.* 253. For a bill may be so drawn as to prevent a demurrer for this cause.

A defendant may demur, if the bill be for relief in a matter not proper for the court; as if a bill of revivor revives an order made by the consent of the plaintiff, now married, and not a party, for her consent is determined. *R. Ca. Ch.* 77.

A demurrer will be allowed to a bill for a conveyance of a mere legal estate, as where *W. T.* devised to his wife for life, remainder to trustees to preserve contingent remainders, remainder to his daughter for life, remainder to trustees as before, remainder to the heirs of her body,

body, remainder over in a subsequent clause, he declared his intention that his daughter should have only a life estate. A bill being filed by the remainder man in fee, to have a conveyance in which the daughter should take only an estate for life, the defendant demurred, and the demurrer was allowed, on the ground that these were only legal estates. 1 *Brown Ch. Rep.* 313.

If plaintiff prays injunction to a *mandamus* from *B. R.* or to an indictment, information, or prohibition, defendant may demur. *Lord Montague v. Dudman*, *T.* 1751. 2 *Vez.* 396.

If bill is brought to establish plaintiff's right of common, and set aside former decrees, a demurrer lies to the whole bill, for plaintiff ought to have brought a bill of review. *Lady Glanville v. Ramsden*, *H.* 1719, in *Scac.* *Bunb.* 56.

Though the defendant has answered the original bill, he may demur to the amended part. *Lowther v. Whorwood*, *M.* 1722, in *Scac.* *Bunb.* 120.

A de-

A defendant may demur if there are not sufficient parties; as if a jointress brings a bill against the heir at law to have a covenant of her husband (to leave a jointure house in repair) performed, and satisfaction for the want of it; the heir may demur, for that the executor ought to be a party; for though at law the creditor may sue the heir only, where he is bound, yet, as the personal estate is the natural fund for debts, and the executor may shew he has performed the covenant, he must be a party in equity. *Knight v. Knight*, M. 1734. 3 P. W. 331.

If the defendant does not demur for want of parties, he may take exceptions for it at the hearing.

Yet if administrator, with the will annexed, is a defendant, another defendant shall not demur, because it does not appear that the executor did not leave an executor, for the court will presume the administrator to be right. *Tourton v. Flower*, T. 1735. 2 P. W. 369.

But if the plaintiff has taken out administration in a proper court, in a foreign country, our courts can take no notice of it; and if he has not also taken it out here, defendant may demur. *Ibid.*

If an estate is charged with 10*l.* per annum wages to the knight of a shire, and a right given to a corporation, consisting only of the two knights and the sheriff, to enter and distrain, and one knight and the sheriff refuse to join in recovering it, and the other brings a bill for it, the defendant may demur. *Shepherd v. Catton*, T. 1747. 1 *Vez.* 38.

If a crew of 80 appoint two of their number agents for prizes, and afterwards sixty-four of them agree the two agents shall have certain shares, and a bill is brought on behalf of the agents and the sixty-four, a demurrer lies, for the whole eighty should be parties. *Leigh v. Thomas*, T. 1751. 2 *Vez.* 312.

To a bill brought for an injunction to stay proceedings in the ecclesiastical court for a church rate, to which a custom was pleaded, and plea admitted, and for discovery

covery of the value of estates, defendant may demur, for they are cognizable there. *Dun v. Coates*, M. 1738. 1 Atk. 288.

If the Lord of one manor brings a bill against the Lord of another manor, to establish a right, and to be quieted in the possession of a fishery, defendant may demur, for the right shall be first tried at law. *Lord Tenham v. Herbert*, 1742. 2 Atk. 483.

Bill brought by a corporation, which stated, that they were a borough by prescription; that they were incorporated by the charter of *Henry* the Sixth, by the name of mayor and burgeses; that King *John* by charter confirmed all their antient customs and privileges, reserving a rent of fifty-two pounds *per annum*; that time out of mind they were lords of the manor, and as such intitled to a toll for two-pence a ton for all goods navigated on the river *Trent*, within the manor; that the defendant carried such a quantity of goods, and therefore the bill was brought for a discovery, account, and relief. The defendant demurred to the account and relief, for that this was

properly determinable at law by action or distress; and the rather for that it did not appear by the bill that the plaintiffs had ascertained their title at law; and *per totam curiam* the demurrer was allowed. *Town of Nottingham v. Wood*, M. 1733, in *Scac.* Bunb. 330.

If the executor of an attorney brings a bill for money due for business done, defendant may demur, for that the remedy is at law, under 2 *Geo. 2, ch. 23.* *Parry v. Owen*, T. 1751. 3 *Atk.* 740.

Bill for a specific performance of suit to the court of the plaintiff's manor was immediately dismissed, as being proper at law. *Thornbagh v. Hartshorn*, T. 1727, in *Scac.* Bunb. 237.

If the Lord of a market brings a bill for the toll of corn brought to market, and that defendant combines to sell by sample at his house, and thereby prevents corn being brought to market, which is forestalling, and prays discovery; these are questions at law, and defendant may demur. *Hawley v. Taylor*, M. 1754. 3 *Atk.* 815.

It

If there is a decree to account an estate to be sold, and the money paid to incumbrances, according to priority, and afterwards the plaintiff discovers, and buys in incumbrances prior to the defendant, and brings a bill to tack his mortgage to these, the defendant may demur. *Wortley v. Birkhead*, T. 1754. 3 Atk. 809.

If a supplemental bill is brought against a defendant, not a party to the original bill, to answer the matters in the original bill, and no new matter is pretended to be arisen since filing the original bill, the defendant may demur. *Baldwin v. Machown*, M. 1754. 3 Atk. 817.

If a bill is brought for discovery of the assignment of a lease without licence, though it is not brought for the forfeiture, yet does not expressly wave the forfeiture, defendant may demur. *Lord Uxbridge v. Staveland*, M. 1747. 1 Vez. 56.

So a defendant may demur to a bill brought by the East-India Company to

discover how he came by the possession of certain goods, and whether not by acts amounting to piracy or felony. *E. I. Co. v. Campbell, T. 1749, in Scac. 1 Vez. 246.*

But a demurrer does not lie to a bill for a discovery of a conspiracy, in setting up a *bastard* child, for it is not a ground for criminal prosecutions. *Chetwyn v. Lindon, T. 1752. 2 Vez. 450.*

Nor can a defendant to whom lands are devised, charged to be an alien, demur to the discovery; for the disability of an alien to hold lands is not a penalty nor a forfeiture, but an incapacity; nor to a discovery whether another defendant is an alien, if the first defendant hath an interest, though uncertain, in the lands. *Attorney-Gen. v. Dupleffs, H. 25 Geo. 2, in Scac. Parker 144.*

So he may demur if the plaintiff does not intitle himself to the thing demanded; as if the husband sue alone for a thing to which he has no title without joining his wife. *Ca. Ch. 41.*

If

If a baptist assigns an advowson for a term, and on conforming brings a bill for a re-assignment, suggesting it was in trust for himself, to avoid the penalties, the defendant may demur. *Cottington v. Fletcher*, H. 1740. 2 Atk. 155.

If a bill brought for real estate seeks a discovery of proceedings in the court of delegates, the defendant may demur, for they relate only to personal estate. *Baker v. Pritchard*, T. 1742. 2 Atk. 387.

If a bill is brought for an injunction, and to establish a right, which is for a monopoly and doubtful, and where the proceedings would be long and expensive, the court will allow a demurrer, for that the plaintiff should have first established his right at law. *Whitchurch v. Hide*, T. 1742. 2 Atk. 391.

If the bill demands an account of an estate from an executor, upon a clause in the will of his testator, who devises a moiety of the estate, which his wife and executor shall have at his death, to the plaintiff. *Cb. R.* 31.

If the bill demands a discovery of a title against a devisee, where the plaintiff does not shew a title in himself. *Ch. R.* 36.

If the lord of a manor brings a bill for the recovery of a fine, suggesting that defendant was admitted by attorney, but denies it, and for arrears of quit-rents, the lands out of which they issue being unknown, and defendant demurs as to relief, the demurrer is good. *North v. E. Strafford, M. 1732. 3 P. W. 148.*

If the bill does not aver the defendant to be the assignee, but only that plaintiff is so informed, the defendant may demur. *L. Uxbridge v. Staveland, M. 1747. 1 Vez. 56.* If it is upon a collateral covenant, not running with the estate, and which therefore does not bind assignees, an assignee defendant may demur. *Ibid.*

So if the plaintiff demands things of several natures against several defendants, in the same bill, if the defendants deny the combination charged, otherwise not. *1 Vern. 416.*

And

And they ought to deny combination without more, for more over-rules the demurrer. *1 Vern. 463.*

Yet where there has been possession of a fishery for a long time, he who claims the sole right may bring a bill to be quieted in possession, though he has not established his right at law; and it is not good cause of demurrer, that defendants have distinct rights, for, on an issue to try the general right, they may take advantage of them. *Mayor of York v. Pilkington, M. 1737. 1 Atk. 282.*

So if the plaintiff sues before cause of action; as if he sues an executor for a discovery of assets before a suit commenced against him; for perhaps he would pay, or confess assets. *Samb. Hard. 115.*

It is a good cause of demurrer, that it appears by the bill that the defendant has been in the uninterrupted possession for 34 years, and no incapacity pretended. *Frazer v. Moor, M. 1719. in Scac. Bunb. 54.*

A trustee

A trustee may demur as well as the *cestui que trust*, and the *cestui que trust* is intitled to have the privilege maintained by the trustee. *E. Suffolk v. Green*, T. 1739. 1 *Atk.* 450.

If discovery is sought whether defendant did not procure subornation of perjury, and whether the evidence of *A.* did not influence a verdict, defendant may demur to both as one question. *Baker v. Pritchard*, T. 1742. 2 *Atk.* 387.

If a legacy is given to a woman, provided she may marry with consent, if the legacy is not given over, she may demur to a bill for a discovery of her marriage. *Chauncy v. Tabourden*, T. 1742. 2 *Atk.* 392.

If a portion is given over on marriage, without consent, defendant may demur to the discovery of the marriage only, though discovery of the consent is not prayed. *Chancy v. Fenboulet*, P. 1751. 2 *Vez.* 265.

But if a man by his will gives his wife the whole surplus of his personal estate,
but

but if she marry again then she is to deliver up half of the surplus to his brother and his heirs, and he shall call her to an account for it, a demurrer to a bill for a discovery of her marriage, and for an account, shall be overruled. *Lucas v. Evans*, T. 1745. 3 Atk. 360.

On a *quare impedit* brought against the ordinary, he filed a bill for a discovery, whether there was not a bond for resignation given, in order to plead it to the action; the defendant demurred, 1st, that the discovery would subject him to penalties; 2dly, that it was immaterial. To the first objection it was answered, that the bond was legal; to the second, that the plaintiff had a right to the discovery, and its materiality must be debated in another place; and the demurrer was overruled. 1 *Brown Ch. Rep.* 96. But *quare*, whether a demurrer in such a case, on the first ground, would not now be allowed? for though in this case both C. B. and B. R. held the bond to be legal, yet the judgment was reversed on a writ of error in parliament. *Ibid.* 98. 1 *Brown Ch. Rep.* 469.

De-

Demurrer lies to a bill brought to discover whether there is such a person, or where he is, only to make him a party. *Dinely v. Dinely*, T. 1742. 2 *Atk.* 394.

If a bill is brought to discover whether defendant, after being instituted to one living, was not instituted, &c. to another, he may demur. *Boteler v. Allington*, H. 1746. 3 *Atk.* 453.

But it is no cause of demurrer that the plaintiff suggests that the court-roll (by which the defendant claims a copyhold) was falsely entered by the steward, though the defendant alledges, that the homage had found the entry to be true.

That the bill contains scandalous matter, for that ought to be referred and expunged. *Pemb.* 1 *Vern.* 107.

If an officer of a company is made a defendant to a bill against the company, for a discovery, though the officer is not interested, and his answer cannot be read against the company, and he may be examined as a witness, and plaintiff can have no decree against him; yet as his
answer

answer may tend to a discovery, as he may be prosecuted for perjury, and the company cannot; and as his answer may direct the plaintiff to draw interrogatories, he shall not demur, but shall answer. *Wyck v. Mead*, T. 1734. 3 P. W. 311.

If a bill is brought for the recovery of a curiosity found in plaintiff's manor, and sold to the defendant undefaced, defendant cannot demur, though plaintiff might have *trover* for the value, or *detinue* for the thing itself. *D. of Somerset v. Cookson*, M. 1735. 3 P. W. 390.

It is not good cause of demurrer to a bill brought for an account of personal estate, that there is a suit depending in the spiritual court for administration, for they have no way of securing the effects in the mean time. *Phipps v. Steward*, H. 37. 2 Atk. 285.

It is not good cause of a demurrer to a bill for a commission to examine witnesses, and for a discovery of matters which the plaintiff may give in evidence in an action which he *intends* to bring,
that

that the action is not yet commenced; it is sufficient if there appear on the bill sufficient grounds for an action. *1 Br. Ch. Rep. 469.*

Demurrer lies not to a bill for a discovery of what goods defendant bought of plaintiff's agent, and what remains unpaid, and for payment of it. *Lisset v. Reave, T. 1742. 2 Atk. 394.*

The plaintiff cannot demur to an answer, though it draws a matter into examination which was settled before by a decree, but ought to move for an order to restrain such examination. *R. Ch. Ch. 56.*

So the defendant cannot demur if he is in contempt, or answers by commission.

A defendant cannot demur and plead, or demur and answer, to the same part of the bill; for the plea or answer overrules the demurrer. *Jones v. E. Strassford, 1730. 3 P.W. 79.*

So if to a bill for an account of rents and profits, to which discovery is incident,

dent, the demurrer, as to so much as seeks an account from a certain time, is, that plaintiff has his remedy at law; and the plea, as to so much as seeks an account before filing the supplemental bill, is the statute of limitations; the demurrer and plea shall be both over-ruled. *Dormer v. Fortescue, H. 1741. 2 Atk. 282.*

If a demurrer is overruled, the defendant may afterwards insist on the same thing in his answer. *Ibid.*

The court will not determine the construction of a will or demurrer if there is any doubt, but will overrule it without prejudice to the defendants, insisting on the same matters by answer; but if on the face of the bill the plaintiff has no title, the court will determine on demurrer. *Brentford v. Edwards, H. 1750. 2 Vez. 243.*

A demurrer bad in part, is void for the whole. *E. of Suffolk v. Green, T. 1739. 1 Atk. 450.*

So

So if a trustee, in an usurious bond, defendant to a bill for discovery, and to perpetuate testimony, demurs to both, it is bad; but had it been only to the discovery, good. *Ibid.*

A demurrer for want of jurisdiction, is informal and improper, the defendant should plead to the jurisdiction. *Robertson v. Rous, M. 1738. 1 Atk. 543.*

Length of time is not proper matter for a demurrer, but for a plea. *Gregor v. Moleworth, M. 1740. 2 Vez. 109.*

If a defendant answers to part of the discovery he cannot demur to the other part. *Abraham v. Dodgson, H. 1740. 2 Atk. 157.*

But defendant may answer to the discovery, and demur to the relief. *Ibid.*

But there cannot be a demurrer to the discovery without a demurrer to the relief, for that would be not to demur to the thing required, but to the means by which it is to be obtained. *2 Brown Ch. Rep. 124.*

Where

Where a bill proper for discovery only also prays relief, a *general* demurrer will be allowed. *Cont. 2 Brown Ch. Rep. 281. Acc. id. 319.*

The court cannot let a demurrer stand for an answer. *Anon. T. 1747. 3 Atk. 530.*

If the bill charges, that by producing a deed under which the defendant claims, it will appear it was made by a tenant for life only, and the defendant does not plead he is a purchaser, but demurs to the whole, it is not good. *Stroud v. Deacon, T. 1747. 1 Vez. 37.*

A defendant cannot demur to a bill for the partition of tithes, for this court can divide them. *Baxter v. Knollys, T. 1750. 1 Vez. 494.*

No benefit of exception can be saved on a demurrer. *Gregor v. Moleworth, M. 1740. 2 Vez. 109.*

The particulars which are demurred, or pleaded to, must be distinguished; it is not enough to say, as to so much of

the bill as is not after answered, &c.
Ghetwynd v. Lendon, T. 1752. 2 *Vez.* 450.

To a *certiorari* bill there can be no demurrer, for it requires no answer. 1

Ch. Ca. 31.

The court will not permit a plaintiff to demand, by one bill, several matters, of different natures, against several defendants; for this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the claims of the other defendants, with which he has no connection. A demurrer therefore, for that the plaintiff demands several matters, of different natures, of several defendants, by the same bill, will hold. 1 *Vern.* 416, 463. *Hard.* 337. But as the defendants may combine together to defraud the plaintiff of his right (and such a combination is always charged by the bill), the defendant must so far answer the bill as to deny combination. 1 *Vern.* 416.

Demurrer, containing distinct matters and parties, in what cases allowed.

Bill to be relieved against several contracts entered into by the plaintiff with the defendants, relating to shares in a bubble,

bubble, called the Pennsylvania bubble, and to have his money repaid which he had paid to the defendants for shares sold by them respectively; and charged, that the defendants had formed themselves into a society to carry on the fraud; the defendants demurred, because the bill contained several and distinct charges against several and distinct defendants; and the demurrer was allowed. *N.B.* They denied combination, as is necessary upon such a demurrer as this. *Bull v. Allen, in Scac. Bunb. 69.*

In *Potts, Clerk v. Durrant*, argued 8th Feb. 1792, in *Scac*, the points resolved were, For multiplicity of matters,

1. That a demurrer for multiplicity of matters, viz. for tithes against all the defendants, and for ascertaining glebe lands against others, is a good demurrer.

2. That it need not be supported by an answer denying combination.

3. That it is good to the whole bill.

*Secus where he
claims one ge-
neral right.*

A demurrer of this kind will only hold where the plaintiff claims several matters of different natures; for when one general right is claimed by the bill, though the defendants have separate and distinct rights, yet the demurrer will not hold; as if a person claiming a general right to the sole property of a river, files a bill against several persons claiming several rights in the fishery, as lords of manors, occupiers of lands, or otherwise.

1. Ark. 282. In this case the plaintiff does not claim several separate and distinct rights in opposition to several separate and distinct rights claimed by the defendant; but he claims one general and entire right, though set in opposition to a variety of distinct rights claimed by the several defendants.

*Will hold to a
bill brought for
part of a matter
only.*

As the court will not permit the plaintiff to demand by one bill several matters of different natures against several defendants, so it will not permit a bill to be brought for part of a matter only; but, to prevent the splitting of causes, and consequent multiplicity of suits, will allow a demurrer upon this ground. *2. Vern.*

If to a bill of interpleader the usual affidavit, that the plaintiff does not collude with any of the parties, is not annexed, the defendant may demur. To such a bill there is likewise another cause of demurrer; for if the plaintiff does not shew that each of the defendants, whom he seeks to compel to interplead, claims a right, both the defendants may demur; one, because the plaintiff shews no right in the defendant demurring; the other, because the plaintiff, shewing no right in the co-defendant, shews no cause of interpleader; or if the plaintiff shews no right to compel the defendants to interplead, whatever rights they may claim each defendant may demur. 1 *Vez.* 248.

To a bill of interpleader for want of the usual affidavit.

An English information to discover copyhold lands, and also what timber had been cut down, and what waste committed, &c. The defendant demurs because there is a forfeiture of the place wasted, and treble damages, and yet the Attorney-General has not waved forfeitures. *Per curiam* the demurrer was allowed; and this differs from the case of a tithe bill, which used indeed formerly to be with a waiver of penalties,

Allowed to an information for not waving penalties.

but has of late been discontinued, because the bill prays only the single value of the tithes. *Attorney-General at the relation of Waters and Vincent, H. 1724, in Scac. Barb. 192.*

To a bill to perpetuate testimony of witnesses if a plaintiff shews no interest in the matter to be examined.

There are few cases in which a man is not intitled to perpetuate the testimony of witnesses. *1 Atkyns 451, 571. 1 P. W. 117. Preced. in Chan. 531. 1 Roll. abr. 383,* and therefore to such a bill a demurrer will seldom lie. But if upon the face of the bill the plaintiff appears to have no certain right to, or interest in, the matter to which he craves leave to examine in present or in future, a demurrer will hold. *Smith v. Attorney-General, Mich. 1777, in Canc.*

Filing demurrer.

By the 4th general rule of the court, the day of filing every demurrer shall be set down upon the same. This being dated and signed by the clerk in court who files it, is delivered over to the adverse clerk in court to be copied, together with a rule for arguing it on the Wednesday se'nnight following; but if in the course of proceeding there should not be a Wednesday se'nnight remaining of

of the term in which it is filed, in that case, the rule must be made for arguing the demurrer at the sittings after the term; and the second day of the sittings is the day fixed by the general rule of the court for arguing and determining demurrers, as well as pleas and exceptions.

This rule is drawn and entered by the clerk in court who files the demurrer, a copy of which is delivered to the adverse clerk in court with the demurrer. This rule must be obtained so as to bear date either in term or in the sittings; if in the latter, the demurrer must be set down to be argued the first Wednesday in the next term.

Rule for the argument of the demurrer, how obtained.

A demurrer may be filed under the signature of counsel only; but where the defendant puts in a demurrer and answer, they are filed as one record under the hands of counsel and the party, and a rule is given for arguing the demurrer as if it stood alone, and not incorporated with the answer.

A demurrer may be filed under the signature of counsel, or under a *dedimus*, with the answer.

The demurrer of P. S. &c.

Form of a de-
murrer to a bill
for want of the
plaintiff stating
himself a debtor,
and accomptant
to his Majesty.

This defendant by protestation not ac-
knowledging any the matters or things
in the said bill of complaint contained
to be true, in such sort, manner, and
form, as the same are therein laid down
and declared, saith, that the said bill and
the matters therein contained are insuffi-
cient in the law to be answered to by
him, this defendant; and that he, this
defendant, need not, nor is bound by the
law of the land, or the rules of this ho-
nourable court, any way to answer the
same; and for cause of demurrer this
defendant saith, that this honourable court
being a court of the revenues of his Ma-
jesty's crown of England, no person or
persons can or ought to sue for any debt,
duty, or thing whatsoever in this court
here, unless he, she, or they, be debtor
or debtors, accomptant or accomptants
to his Majesty in this court, and shew
forth the same in and by his, her, or their
bill of complaint exhibited in this ho-
nourable court, which the said complaint-
ant hath not done in this her bill; where-
fore this defendant doth demur in law to

La neque adeo
si quoniam
It demurrer to
the whole bill
is, because
is with costs
be taxed

the said bill, and prayeth to be dismissed with costs.

Where a demurrer is filed to an injunction bill, plaintiff only apply to the court for a short day to be appointed for arguing the same. In general the court appoints the third or fourth day from that on which the motion is made.

Demurrers being considered as dilatory to the proceedings of a plaintiff in equity, by the 10th general rule of the court, where the demurrer is not set down to be argued on the Wednesday se'nnight or other day appointed for the arguing thereof, the plaintiff may move to overrule the same for not being set down; in which case the defendant is to pay to the plaintiff or his clerk in court 40s. costs, and after his answer to rejoin gratis; but in case the demurrer be ordered to stand good, the plaintiff is to pay to the defendant, or to his clerk in court, 30s. costs; and if the demurrer be to the whole bill, and allowed by the court, the bill is to stand dismissed with costs. So where a demurrer is filed, but no rule given to argue

Demurrer to an injunction bill may be argued on a short day to be appointed by the court.

Costs on overruling, allowing, or submitting to, a demurrer.

40s. costs upon overruling it.

30s. upon allowing it.

If demurrer to the whole bill, and allowed, it is with costs to be taxed.

it,

it, the plaintiff may move to overrule it on the day on which it should have been set down to be argued.

Demurrer grounded upon a mistake in the bill, it may be amended.

By the 13th general rule of the court, if the demurrer be grounded upon some error, slip, or mistake in the bill, the plaintiff shall be admitted of course to amend the same, paying to the defendant, or his clerk in court, 20s. costs; but if the plaintiff do not, within four days after such demurrer put in, amend or alter it, and pay the costs, then the demurrer shall be determined in court.

Demurrer being allowed or submitted to, plaintiff may amend his bill.

If a demurrer is filed to parts of the bill, and either allowed upon argument, or submitted to two days previous to the day for arguing it, it is a motion of course for a plaintiff to move to amend his bill.

After motion for time to plead, answer, or demur, but not to demur alone, if the defendant demurs, and by way of answer only denies combination, this is not a compliance with the terms of the order, and the demurrer will be discharged, and ordered to be taken off the file

file with costs. 1 *Brown Ch. Rep.* 78.

Vide 3 *Atkyns* 726.

A defendant may demur at the bar *ore tenus* (though he has before put in a demurrer which is overruled), and in that case it shall be without costs on either side. *Tourton v. Flower*, T. 1735. 3 P. W. 369.

By *stat. 10 Ch. I. ch. 2.* No informality in pleading shall be taken advantage of in a general demurrer; but a party may demur generally, and may *ore tenus* at the bar demur for want of equity, and shew any substantial fault in the bill.

No informality in pleading to be taken advantage of in a general demurrer.

But where a bill was brought by plaintiff as lord of a manor to establish his right to a portion of tithes, and for an account, the demurrer went to the whole relief prayed by the bill; and in support of the demurrer it was argued, that the bill did not state a sufficient title in the plaintiff to the tithe in question; for that it only stated, that the plaintiff was seized; and not that he was seized in fee, as it ought to have stated. *Per curiam.*

Demurrer for want of a title in a bill to establish a right to a portion of tithes and for an account, overruled for being too general.

In

In a bill to establish a right such an allegation is too loose, though it is sufficient to sustain the account; but the demurrer being general it must be overruled. *Edwards v. Newton*, 25 Feb. 1785, in *Scat. M. 5*.

If the demurrer be for want of parties, where the bill is for a discovery of other parties concerned in interest, it will be overruled. 1 *Vern. 95*.

General words preceding a Demurrer.

The demurrer of *A. B.* defendant, to the bill of complaint of *C. D.* complainant.

This defendant by protestation not confessing or acknowledging all or any of the matters or things in the complainant's bill mentioned to be true, in such manner and form as the same are therein and thereby set forth and alledged, doth demur, and for cause of demurrer sheweth that, &c.

Or

In a bill to establish a right such an allegation is too general to sustain the account; but the demurrer

Or in this form.
This defendant (as before) therein and thereby set forth and alledged, saith, he is advised that there is not any matter or thing in the said bill of complaint contained, good and sufficient to call this defendant in question in this honourable court for the same; but that there is good cause of demurrer thereto, and for cause of demurrer sheweth that, &c.

Where the demurrer is to part of the bill or to the relief.

This defendant (as before) in such manner and form as the same are therein set forth as to so much and such part of the said bill as prays (*if to the relief*), &c. this defendant doth demur, and for cause of demurrer sheweth, &c.

Or in this form.

As to so much of the complainant's bill, &c. this defendant by protestation not confessing or acknowledging the complainant's bill to be true in such sort, manner, and form, as the same matters are

are therein set forth, doth demur, and for cause of demurrer sheweth, &c.

General words of conclusion to a demurrer.

Wherefore this defendant doth demur to the said bill of complaint, and to all the matters and things therein contained, and humbly demands the judgment of this honourable court, whether he shall be compelled to make any further or other answer thereto, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

Or in this form.

Wherefore, and for divers other errors and imperfections, this defendant doth demur thereto, and humbly demands the judgment, &c.

Where the demurrer is to part only, or to the relief.

Wherefore, and for divers other errors and imperfections appearing in the said bill, this defendant doth demur to so much and such part of the said bill as
afore said,

aforesaid, and humbly prays the judgment of this honourable court whether he shall be compelled to make any answer to such part of the said bill as is so demurred unto, &c.

Or in this form.

And therefore, and for other good causes of demurrer in the said bill contained, as to so much of the said complainant's said bill as is demurred unto as aforesaid, this defendant doth demand the judgment of this honourable court, whether he shall be compelled to make any answer to such part of the said bill as is so demurred unto, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

Defence

*Defence by Plea.***Plea, what.**

A PLEA is a special answer to a bill, shewing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred. *Prac. Reg.* 275.

Its use in a court of equity.

The use of a plea in equity is to save time, expence, and vexation ; therefore, if one point will put an end to the whole cause, it is important to the administration of justice that it should be pleaded ; but a plea containing two different and distinct points does not answer these ends. An answer is a more commodious form, and therefore, if such a plea be pleaded, it will be ordered to stand for an answer with liberty to except. 1 *Brown Ch. Rep.* 417, 418.

But a plea of a conveyance, and of fine, and non claim, is not multifarious, but a good plea to a bill impeaching the conveyance, as not being for valuable consideration. 1 *Brown Ch. Rep.* 274.

The

The defence proper for a plea must be such as reduces the cause to a particular point, and thence creates a bar to the suit. The end of a plea is to save to the parties the expence of an examination of witnesses at large; and therefore it is not every good defence in equity that is good as a plea. For where the defence consists of a variety of circumstances there is no use of a plea, as the examination must still be at large, and the effect of allowing a plea will be, that the court will give judgment on the circumstances of the case before they are made out by proof.

Defence proper
for a plea.

1 *Ackyns* 44. *Mitf. on Plead.* 177.

Pleas are of three sorts :

Pleas their sorts.

1st, To the jurisdiction of the court.

2d, To the person of the plaintiff or defendant.

3d, In bar of the plaintiff's suit.

Pleas to the jurisdiction of the court, and to the person of the plaintiff, generally go to the whole bill, and affect both the discovery sought and the relief, if

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any,

any, prayed by the bill. But pleas in bar of the suit, though they frequently go to the whole bill, and affect both the relief and discovery, yet sometimes only affect part of both, and sometimes only one, and sometimes the other only, or part only of one or of the other.

What is a good plea, and what not.

A plea that brings no new matter before the court will be overruled; as if a defendant plead a sentence in the admiralty court which is notined in the bill. 1 *Brown Ch. Rep.* 57.

The plea must not put a negative on the bill; a denial of the facts stated in the bill is proper for an answer; a plea must confess and avoid. *Semb.* 1 *Brown Ch. Rep.* 409, 411.

Thus where the plaintiff deduces his title as heir at law, the defendant cannot plead that the plaintiff is not heir at law, he must deny his title, by way of answer, as explicitly as it is laid. 2 *Brown Ch. Rep.* 143.

So in the case of a purchaser for valuable consideration, if the bill charge particulars

A plea
be allowed

particulars of notice, the defendant must deny all the circumstances particularly, and not generally, *Ib.* 146.

The defendants may plead to the bill, to the jurisdiction of the court; as that the parties dwell in a county palatine, and the suit is for land there, or matters local. *Semb. Ca. Ch.* 41.

But when only one party dwells there, or it be for a thing personal, it is no plea. *Ca. Ch.* 41.

So it is no plea that the university has consueance in all causes in law or equity where a scholar is a party, for that does not extend to matters of mere equity. *R. 2, Vent.* 362.

A plea to the jurisdiction of Chancery (or of any other of the King's superior courts of general jurisdiction), must shew what other court has jurisdiction. *E. Derby v. D. of Athol, H. 1748. 1 Vez.* 202.

A plea which covers too much cannot be allowed for part; as a plea to the jurisdiction

jurisdiction where plaintiff has a right to a discovery, though not to relief. *Ibid.*

Or if a rectory is devised to a college in trust, to present the senior divine then fellow, defendant cannot plead to the jurisdiction as being in the visitor. *Green v. Rutherford*, P. 1750. 1 *Veaz.* 462.

But if an information is brought for relief against an undue election to a fellowship in a college, defendant may plead that there is a visitor who has the sole determination of such matters. *Attorney-Gen. v. Talbot*, H. 1747. 3 *Atk.* 662. 1 *Veaz.* 78.

To the disability of the plaintiff, as *that he is excommunicated*; and that shall be shewn under the seal of the ordinary. *Prac. Reg.* 277, 8.

That plaintiff is an alien born, and an alien infidel, not of the Christian faith, is not a good plea to a bill for a personal demand. *Ramkiffenseat v. Barker*, 1737. 1 *Atk.* 51.

In the plea of *an alien* the defendant must first aver, that the person was *an alien*, or it is no bar. *Burk v. Brown*, T. 1742. 2 Atk. 397.

Plea of conviction of a capital offence must be judged with equal strictness here as if at common law. *Ibid.*

Therefore that *A.* gave *B.* a mortal wound, of which, &c. without saying in what part, is bad. *Ibid.*

Or if he says he was tried at the assizes, without saying that the person who tried him had a commission of oyer and terminer, it is bad.

That he is outlawred in another cause, and the outlawry shall be shewn *sub pede sigilli*. *Prac. Reg.* 276.

But *outlawry*, in the same cause for which relief is prayed, is no plea, but shall be disallowed of course, as for delay, and the plaintiff shall pursue his process for other answer and five marks costs. *Ord. per Cla. Rules and Orders of Chan.* 97. *Prac. Reg.* 277.

And when outlawry in another cause is reversed, the plaintiff, upon payment of 20s. to the defendant, shall take out a *subpœna* against him to answer the same bill. *Ibid.*

So, by order in this court, if a plea of outlawry be admitted or allowed, and the outlawry be reversed, the plaintiff, paying the costs, shall take out a new *subpœna* to answer his bill. *Rules and Orders in the Exchequer, Rule 11.*

If one defendant pleads outlawry in the plaintiff, it is good only for himself. *Ca. Ch. 3.*

Outlawry of an executor is no plea to a suit as executor. *1 Vern. 184.*

Plea for want of parties is in bar to the whole bill, discovery, and relief. *Plunket v. Penfon, T. 1740. 2 Atk. 51.*

Plea that the bill is only against the representative of real, and not of personal, estate, must be allowed, though suspected only for delay, unless it is suggested,

gested, that the representation is contesting in the ecclesiastical court. *Ibid.*

It is a good plea to a bill for discovery of assets, that the administrator is not a party, though he is acknowledged to be insolvent. *Albursst v. Eyre, P. 1740. 2 Atk. 51.*

So a defendant may plead another suit depending in the same or another court, for the same cause. *Ord. per Cla. Rules and Orders of Chan. 98, 99. Ca. Ch.*

241.

A plea that another action is depending in another court for the same thing is bad, for the plaintiff need not make his election till the defendant has answered. *Jones v. E. Strafford, M. 1730. 3 P. W. 79.*

That the bill is for the same matter for which the plaintiff brought another bill is not a good plea, if the last is brought in a different right; as if the first is as executor or administrator, the second as administrator *de bonis non*, &c.

of the intestate. *Huggins v. York Buildings Company*, T. 1740. v. 2 *Atk.* 44.

If the defendant pleads the dependancy of a former suit, for the same matter complained of in the bill, and the plaintiff shall admit the plea, that then the plaintiff shall pay to the defendant 40s. costs; and if the plaintiff shall not, two days before the same is set down to be heard, or sooner, admit the plea, and pay 40s. costs, then the same is to be heard in court; and if upon hearing it shall be adjudged a good plea, then the plaintiff is to pay 3l. costs.

Rules and Orders in the Exchequer, Rule

14.

To support a plea of a former decree, so much of the former bill and answer must be set forth as to shew the same point was then in issue. *Child v. Gibson*, T. 1743. 2 *Atk.* 603.

A decree in a former suit, for the same matter, cannot be pleaded till it is inrolled. *Anon.* 1754. 3 *Atk.* 809.

But

But it may be insisted on by way of answer. *Kensley v. Kensley*, T. 1754. 2 Vez. 557.

A former decree signed and inrolled, in which plaintiff was an infant, is a good plea; for an infant plaintiff is bound by a decree as one of age. *Gregory v. Molefworth*, H. 1747. 3 Atk. 626.

Or another bill dismissed for the same cause, though the decree be not signed or inrolled. *Vern.* 310.

If the representative of a co-administrator brings a bill of revivor, and supplemental bill, for the same thing that the two administrators had brought one before, which upon the death of one the other had dismissed, such dismissal is a good plea. *Bowden v. Beauchamp*, M. 1740. 2 Atk. 82.

Plea of decree of foreclosure and non-payment is not good if there has been no final order to foreclose, whatever length of time has elapsed, but it may be a good defence. *Senhouse v. Earl*, T. 1752. 2 Vez. 450.

If there be another suit for the same cause at common law, the defendant may move, that the plaintiff may make his election whether he will proceed at law or in equity.

So the defendant may in Chancery plead *another suit dismissed in the Exchequer* for the same cause. *Ca. Cha. 155, 6.*

But otherwise if the dismissal was *without prejudice in law or equity*, *R. Ca. Ch. 156.*

A bill dropped for want of prosecution, cannot be pleaded as a decree of dismissal to another bill; nor is it sufficient that the court *implied* there was no title when they dismissed the bill; an absolute determination of the court, that the plaintiff has no title, must be shewn. *Brandlyn v. Ord, M. 1738.*

1 Atk. 571.

A plea of a former suit ought to shew that the defendant was served with process. *Abr. Ca. 39.*

But

But to a bill by *A.* against *B.* for a foreclosure, a former bill in the Exchequer by *B.* for redemption, is no plea. 1 Vern. 220.

A plea of former suit shall be without oath, for it ought to be referred to a Master, whether there be such a suit. 1 Vern. 332.

A plea of another suit, depending for the same matter, must set forth when it was instituted. *Foster v. Vassal*, M. 1747. 3 Atk. 587.

If a creditor who has come in and proved his debt before a Master, under a decree at the suit of another creditor, brings a new bill, the former suit is a good plea. *Neve v. Weston*, T. 1747. 3 Atk. 557.

If there is a decree for tithes, and the account is depending before the Master, the defendant may plead this suit, and decree to a new bill brought, for the account in this court is taken down to the time of making the report. *Bell v. Read*, M. 1747. 3 Atk. 590.

If

If an executor assents to a specific legacy, and the legatee brings *trover*, and recovers large damages, the verdict and judgment are a good bar to a bill by an executor to set them aside. *Williams v. Lee*, T. 1745. 3 Atk. 323.

A plea of a foreign sentence, in a commissary court in France (*the bureau des actions*), is bad. *Gage v. Bulkeley*, H. 1744. 3 Atk. 315.

And it need not aver that the former suit is depending, for it shall be referred, and, if set down to be argued, is admitted. 1 Vern. 332.

If parties have agreed to make the submission to an award a rule of court, and to be restrained from bringing a bill in equity, arbitrators may plead in bar the award, though it should be defective in point of law. *Lingood v. Croucher*, T. 1742. 2 Atk. 395.

If a bill is brought against an arbitrator for discovery of the grounds of his award, he may plead, he is not obliged

obliged to set them forth. *Anon.* T.
1748. 3 *Atk.* 644.

An award (unless there is collusion, or gross misbehaviour), is a good plea to a discovery as well as to the merits. *Tir-terson v. Peat*, T. 1747. 3 *Atk.* 529.

If a plea of an award is allowed to a bill praying a general account, yet the plaintiff is not precluded at the hearing from objecting to the award for fraud, or partiality in the arbitrators. *Langgood v. Eade*, M. 1742. 2 *Atk.* 501.

If one partner brings a bill for discovery and relief against another, who pleads, that by their articles all differences relating to their partnership should be referred; that the bill relates to such only; that they have not been submitted, nor has plaintiff offered, though defendant has been always ready, &c.; this is not good, for there should have been a clause empowering arbitrators to examine parties and witnesses upon oath, which by this they cannot do. *Wellington v. Mackintosh*, P. 1743. 2 *Atk.* 569.

But

But it is said, that with respect to this point *Lord Hardwicke's* opinion must have been misrepresented, for the parties could not give arbitrators such a power. *D. per Kenyon, Master of the Rolls, 2 Brown Ch. Rep. 337.*

And therefore, that by articles of partnership, all differences which might arise were to be referred to arbitration, and that the matters in dispute had not yet been so referred, is a good plea to a bill for an account of a partnership. *Ibid. 336.*

So a defendant shall plead the statute of limitations. *Prac. Reg. 279.*

Where a defendant has been in possession of an estate *pour autre vie* for 30 years, the statute of limitations is a good plea, though plaintiff had not the lease in his possession, and the defendant sets out that the lease had been renewed. *Low. v. Burron, P. 1734. 3 P. W. 262.*

The statute of limitations is a good plea (but not a good demurrer) to a bill to redeem, after the mortgagee has been
in

in possession many (as thirty) years.

Aggas v. Pickarille, T. 1745. 3 Atk. 225.

Intestate dies abroad, leaving an infant son, administration is granted during the minority to A. who does not sue; the son, *administrator de bonis non*, within six years of coming of age, sues; yet the statute of limitations may be pleaded against him. *Wych v. E. I. Company*, T. 1734. 3 P. W. 309.

A corporation may plead the statute of limitations as well as private persons.

Ibid.

The statute of limitations may be pleaded, though an original has been filed, if there have been no proceedings upon it for six years. *Lacon v. Lacon*, T. 1742. 2 Atk. 395.

To a note to pay an annuity, or a sum three years after date, or a sum by instalments, the plea must not be, did not promise, but, that the cause of action did not accrue within six years. *Allen*, H. 1743. 3 Atk. 70.

Ple-

Plenarty for six months is a good plea to a bill praying that defendant, who was presented by a trustee in breach of trust, may be compelled to resign. *Botcler v. Allington, H. 1746. 3 Atk. 453.*

The *statute of limitations* is no plea where the bill charges fraud, but it should charge, that the fraud was discovered within six years before bringing the bill. *S. S. Comp. v. Wymondsell, M. 1732. 3 P. W. 143.*

The *statute of limitations* cannot be pleaded to the discovery when the debt was due, though it may be to the debt itself. *Mackworth v. Clifton, T. 1740. 2 Atk. 51.*

A fine and non-claim is not a good bar to plaintiff's title, if a suit had been pending in this court, in a case where there is proper matter of equity. *Baker v. Pritchard, T. 1742. 2 Atk. 387.*

If a man enters upon an estate, on the footing of a trustee, and performs the trust, but never makes any declaration

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tion of it, and then levies a fine, a plea of this fine and non-claim shall not be allowed to bar a remainder-man. *Shields v. Atkins*, T. 1747. 3 Atk. 560.

The statute of limitations cannot be pleaded to a bill for discovery of a title, and charging fraud; but defendant must answer to the fraud. *Bicknell v. Gough*, T. 1747. 3 Atk. 558.

So the defendant may plead *the privilege of the University to have connissance of pleas*. Ca. Ch. 237. 2 Vent. 362.

That the bill requires an answer to a matter which subjects the defendant to a penalty, or accuses him of a crime. I Vern. 109.

If a discovery is prayed of a contract to purchase an estate devised to the vendor, against whom there has been a verdict, and a receiver put in possession by the court, to both which this contract was subsequent, it is within the statute 32 H. 8, ch. 9, against selling pretended titles, which statute defendant may plead. *Sharp v. Carter*, T. 1735. 3 P. W. 375.

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If

If a bill is brought for relief against a policy of insurance, suggesting the ship was fraudulently lost, and that she had only wool on board, and interrogating what goods were on board, the defendant may plead the statutes making exportation of wool penal; but if any other kind of goods are mentioned in the charging part, defendant must give some answer to that. *Dancoif v. Blake*, H. 1737. 1 Atk. 52.

If a plea of the statute of frauds, as to a discovery, is coupled with an answer, admitting the facts, the plea must be overruled. *Cottington v. Fletcher*, H. 1740. 2 Atk. 155.

So if the bill be for a redemption, upon a suggestion, that *A.* conveyed to the father of the defendant in mortgage, who agreed to make a defeazance; a plea that the land was settled in marriage on the defendant, for a consideration paid, without notice of such agreement, is good. R. Ch. R. 9.

If to a bill by a creditor, under a will, for sale of lands, for payment of debts, for

for discovery of title to lands in widow's possession, she pleads a deed of settlement and jointure, and offers to discover, if plaintiff will confirm; it is bad, unless she sets forth the particular lands, and the date of the deed. *Chamberlain v. Knapp*, H. 1735. 1 Atk. 52.

So a defendant shall plead to a bill for discovery of a title, *that he is a purchaser for a valuable consideration, without notice of the plaintiff's incumbrance.* 2 Vent. 361.

And need not shew for what consideration. *R. Ca. Ch.* 34. *R. Hard.* 510.

A valuable consideration set forth by defendant protects him from giving an answer to a title set up by the plaintiff, but a plea of bare title, without setting forth a consideration, will not. *Brereton v. Gamol*, H. 1741. 2 Atk. 240.

So it need not mention the time of the purchase. *R. Hard.* 310.

But if the plea does not add, *that he was a purchaser without notice*, it is bad. *R.* 2 Vent. 361. *Semb.* 1 Vern. 179.

To a bill for discovery of defendant's title it is a good plea, that a writ of right had been tried and determined against the plaintiff, who was defendant in the writ of right. 1 *Brown Ch. Rep.* 305.

But where the bill is for a discovery leading to relief at law, the defendant cannot plead, in bar to the discovery, matter which would be a bar to the legal remedy. 2 *Brown Ch. Rep.* 11.

In a plea of a purchase, if defendant says he had no notice at the time of the purchase, he need not say, he had it not at any time before. *Jones v. Thomas, H. 1733.* 3 *P. W.* 243.

And without notice at the time of the purchase, is not sufficient, without saying, that he had no notice when the conveyance was executed. *R. Ca. Ch.* 34.

If a purchase for valuable consideration without notice, is pleaded to a bill which charges particular and special notice, a general denial of notice is not sufficient, it must deny as specially, or it will be bad.

bad. *Radford v. Wilson*, M. 1754. 3
Atkyns 815.

If to a bill for possession, defendant pleads purchase for a valuable consideration, and that the money is paid, or *bona fide secured to be paid*, and it is in fact only secured, the plea shall be overruled; for he has now notice of plaintiff's title. *Hardington v. Nicholls*, H. 1745.
 3 *Atkyns* 304.

And notice shall be by way of answer, and not by plea. R. 2. *Ca. Ch.* 161.

If defendant in a plea of purchase, for a valuable consideration, omits to deny notice, and plaintiff replies, defendant need only prove his plea, for plaintiff might have set it down to be argued. *Harris v. Ingledew*, H. 1730. 3 *P. W.* 91.

In pleading a purchase or mortgage, the defendant must shew, that the vendor or mortgagor pretended to be seised in fee. *Head v. Egerton*, P. 1734. 3 *P. W.* 280.

On a plea of a purchase for a valuable consideration, without notice of plaintiff's title, it is sufficient to aver, that the person who conveyed was seised, or pretended to be seised, when he executed the purchase deeds; but where fine and non-claim is the bar, the averment must be, that he was actually seised; seised *de libero tenemento* is sufficient. *Story v. Lord Windsor, T. 1743. 2 Atkyns 630.*

So if a defendant pleads *a settlement after marriage pursuant to an agreement before*, the plea ought to shew what the agreement was. *1 Vern. 139.*

If the defendant pleads *that he is a purchaser bona fide without notice, and denies the fraud alledged in the bill*, it is not good, unless he *answers to the fraud.* *1 Vern. 185.*

If he does not shew the vendor seised and possessed, it is bad. *1 Vern. 246.*

If he pleads it to more than was settled for what is then due, it will be bad. *Ch. R. 143.*

If

If under one roof there was formerly a fulling-mill and a corn-mill, which paid a *modus* of 6s. 8d. and the fulling-wheels are taken away, and two corn-mills are put in its place, and a bill is brought for the tithe of three mills, and the *modus* is pleaded for the one mill, it is bad in form and in substance. *Talbot v. May*, M. 1743. 3 *Atkyns* 17.

So to a bill by an executor for an account of the profits of an estate *pour autre vie*, the defendant may plead, that *the testator permitted him to take the profits for a debt, upon which he entered, and the testator being dead has title as occupant.* R. 1 *Vent.* 364.

So to a bill for a discovery, the defendant shall plead, *that what he knew was only as counsel, arbitrator, &c.* R. Ca. Ch. 277.

So the defendant may plead, *that he being a mortgagee, upon bearing of prior incumbrances, purchased an estate prior to the plaintiff's, with an offer to assign on payment of the money due upon both.* R. Ca. Ch. 150.

So if a mortgagee takes a prior estate in fee, he shall not be obliged to make discovery. *D. Hard. 173.*

Otherwise where he purchases other incumbrances. *R. Hard. 172.*

So for a defendant to a bill for the discovery of the goods of a bankrupt, it shall be a good plea, that he purchased them bona fide for a valuable consideration, before a commission, and before notice of the bankruptcy. *R. 1 Ven. 27.*

Plea of a stated account must shew it was in writing, and what the balance was. *Bark v. Brown, T. 1742. 2 Atkyns 397.*

A plea of a stated account as to all matters herein before accounted for is bad; it should aver, that it is just and true to the best of defendant's knowledge and belief. *Anon. H. 1743. 3 Atkyns 70.*

If a bill impeaches an account and charges that plaintiff has no counterpart of it, defendant, if he pleads a stated ac-

count,

count, must annex a copy of it. *Hankey*
v. Simpson, 11 H. 1745. 109 *Hankey* 303.
D. Hard. 173.

But to a bill to be relieved from a bond for the balance of an account, a plea that the account was stated with his testator, and the vouchers delivered up, and a bond given for the balance, was overruled. *Ca. Ch. 1262.*

Bill for an injunction to an action for waste, because the waste alledged was an improvement; plea of the statute of Gloucester, which allows an action for waste against the lessee, was overruled. *Ch. R. 135.*

Bill for money secured by mortgage, and also by bond, plea that the plaintiff in an action at law upon the same bond was non-suited, is not good. 11 *Vern. 778.*

Bill for relief against a policy to pay without abatement, if *A.* died before *M.* plea, that *A. did die before*, overruled. *R. 2 Vern. 10.*

Bill to be relieved against a verdict at law, plea of the verdict and judgment, and that

that the matter is *confusable at law*, and the plaintiff did there *insist upon it*; overruled. *R. 2 Ver. 146. 155.*

If a bill be brought to set aside a will for fraud, and for a receiver, and defendant pleads that the will was duly executed, and ought to prevail till found otherwise at law, and therefore no receiver should be appointed till then; the plea is good as to the first part, but not as to the latter. *Anon. Mich. 1743. 3 Atkyns 17.*

Bill for an account of goods sold by the sheriff upon an execution at an under value; plea that they were offered to the plaintiff at the same value is good. *R. Ch. R. III.*

If a bill be brought against an administrator for a distribution, it is not a good plea that he is not obliged to do it within the year; but it shall stand for an answer, with liberty to except. *Hart v. King, in Scac. T. 1720. Bunb. 64.*

If the plea is to discovery and relief, when the bill prays only a discovery, it is

is bad. *Asgill v. Dawson, in Scac. H.*
1720. *Bumb. 70.*

A plea may be bad in part, yet not
bad in the whole. *Duncalf v. Blake, H.*
1737. 1 *Atkyns 52.*

A bill, so far as not contradicted by the
plea, must be taken to be true. *Plunket*
v. Penfon, T. 1740. 2 Atkyns 51.

If a bill is brought for payment of a
note of an intestate, charging that the
administrator promised to pay as soon as
he got in the effects, a plea that defend-
ant made no promise to pay is bad, as
being too general; it should be, no pro-
mise to pay out of the assets. *Anon. H.*
1743. 3 *Atkyns 70.*

If a plea is to the relief only, and di-
rected to stand for an answer, the words
with liberty to except must be added, or it
is allowing it a good answer. *Maitland*
v. Wilson, M. 1754. 3 Atkyns 814.

A plea containing exception of matters
hereinafter-mentioned is bad. *Salkeld v.*
Science, M. 1750. 2 Vez. 107.

So

So to a bill for an account and discovery, a plea of release, farther and other than in the plea set forth. *Ibid.*

Unless the only sums mentioned in the plea are also mentioned in the release, for that makes it the same; as if it had been said, *farther than is in the release*, which is good in form. *Ibid.*

But if there are charges of account made up, and dealings which require answer and discovery, such plea of release is bad in substance; for if allowed, plaintiff could not except. *Ibid.*

If the defendant does not prove the fact necessary to support the plea, the plaintiff shall not lose his discovery, but the court will order examination on interrogatories to supply it. *Brownsword v. Edwards, H. 1750. 2 Vezey 243.*

A plea may be amended if there be a mere slip, where the material ground of defence appears sufficient, but not otherwise. *2 Brown Ch. Rep. 147.*

The

The same rule which applies to the Arguing pleas. arguing of demurrers, and the costs of allowing, disallowing, or submitting thereto, applies also to the arguing of pleas. Except as to costs upon pleas of dependency of a former suit.

By the 8th general rule of the court, every defendant who shall not answer according to the rule of the court, but desires a commission to take his answer; on taking forth such a commission, shall not put in a demurrer or dilatory plea, but may put in an answer or plea in bar, unless otherwise ordered by a motion in court.

A defendant desiring a commission to take his answer, shall not put in a demurrer or dilatory plea, but may answer or plead in bar.

By the 14th general rule of the court, if the defendant shall plead the dependency of a former suit for the same matter complained of in the bill, and the plaintiff shall admit of the said plea, that then the plaintiff shall forthwith pay to the defendant, or to his clerk in court, 40s. costs; and if the plaintiff shall not, two days before the same is set down to be heard, or sooner, admit the said plea, and pay 40s. costs, then the same is to be heard in court, and if upon hearing it shall

Plea of the dependency of a former suit.

40s. costs upon being admitted.

If allowed on hearing, 3*l*. costs.

shall be adjudged a good plea, then the plaintiff is to pay 3*l*. costs.

Plea to be argued before exceptions can be taken to the answer.

Where a plea is put in to part of a bill, and an answer to the residue, the plea must be first disposed of, either by arguing it, or submitting to it before any exceptions can be taken to the answer.

Plea ordered to stand for an answer, with liberty to except.

So it frequently happens that, upon the argument of a plea, the court will order it to stand for an answer, with liberty to except thereto. In this case no costs are paid on either side, but wait the final event of the cause.

Plea in bar, taken under a general commission to take an answer, not to be received.

A defendant had pleaded in bar to the plaintiff's bill, but the plea was not suffered to be opened, for that it came in by a general dedimus, which was to take the answer only, and not his plea, answer, or demurrer. 2 *Vern.* 275.

Plea may be received under the usual order for time to plead, answer, &c.

But a plea unaccompanied with an answer, will be received under the usual order for time to plead, answer, and demur, and if the order be to answer only, the defendant may put in a plea, for

for that is an answer, and upon oath. 112

P. Wms, 464. Anon.

The plea of defendant, to the bill of complaint of complainant. Introduction to a plea.

This defendant by protestation not confessing or acknowledging all or any of the matters and things in the complainant's said bill of complaint contained to be true, in such manner and form as the same are therein and thereby alledged; for plea unto the said bill saith, that, &c.

All which matters this defendant doth aver and plead in bar of the complainant's said bill, and of the complainant's pretended demands for which he seeks relief; and this defendant prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained. Conclusion to a plea.

And therefore this defendant doth plead the said (*act of Parliament release, &c.*) in bar to the said complainant's bill; and humbly demands the judgment of this Or thus.

By Disclaimer.

A DEFENDANT may disclaim all Of disclaimers. right or title to the matter in demand by the plaintiff's bill, or by any part of it. But a disclaimer can scarcely be put in alone. For if the defendant has been made a party by mistake, having never had an interest in the matter in question, yet as he may have had an interest which he may have departed with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not ; and if in truth it is so, an answer seems necessary to enable the plaintiff to make the proper party, instead of the defendant disclaiming. The form of a disclaimer alone, seems to be simply an assertion, that the defendant disclaims all right and title to the matter in demand ; but the forms given in the books of practice are all of an answer and disclaimer. *Mitford* 253.

Disclaimer, in
point of form,
is an answer.

A disclaimer being therefore, in point of form, an answer, the words of course which precede and conclude the one, are pursued as to the form of the other.

Where a title is set up to an estate by a bill, and you make a person defendant who disclaims all right, and do not bring him to a hearing, the court said, you shall not read his evidence as a proof of your own right, to the prejudice of another defendant. *Hill v. Adams*, 2 *Atk.*

39.

If defendant dis-
claims, and
plaintiff replies,
he shall pay
costs.

Where a defendant disclaims generally to all the matters in the bill, the plaintiff is not to reply; if he does, the defendant may have costs against him for the vexation; but if the disclaimer be only to part of the matter in question, and as to the other part there is an answer, in such case there may be a replication to that part which contains the answer. *Har. Chan. Prac.* 373.

Defence

Defence by Answer.

AN answer generally controverts the Answer, what. facts stated in the bill, or some of them, and states other facts to shew the rights of the defendant in the subject of the suit; but sometimes it admits the truth of the case made by the bill, and, either with or without stating additional facts, submits the questions arising upon the case thus made to the judgment of the court. If an answer admits the facts stated in the bill, or such as are material to the plaintiff's case, and states no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary; the answer is considered as true, and the court will decide upon it. But if the answer does not admit all the facts in the bill material to the plaintiff's case, or states any fact which the plaintiff is not disposed to admit, the truth of the answer, or of any part of it, may be denied, and the sufficiency of the bill to ground the plaintiff's title to the relief he prays may be asserted by a replication,

tion, which in this case also concludes the pleadings, according to the present practice of the court. *Mitford on Plead.*

35, 16.

Defence by answer.

If a plea is overruled, the defendant may insist on the same matter by way of answer. 3 *P. W.* 95. 2 *Vex.* 492. 1 *Atkyns* 450. And whatever part of the bill is not covered by demurrer, or plea, must be defended by answer. *Prac. Reg.* 280. Unless the defendant disclaims. *Mitf.* 244.

Every plaintiff is intitled to a discovery from the defendant of the matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case; and to enable him to obtain a decree. *Ibid.* 244.

A plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expence. 2 *Atkyns* 241. He is also intitled to a discovery of matters necessary to substantiate the proceedings, and make them regular and effectual in a court of equity. 2 *Vex.* 492. But if the discovery sought by

by a bill is matter of scandal, or will subject the defendant to any pain, penalty, or forfeiture, he is not bound to make it; and if he does not think proper to defend himself from the discovery by demurrer or plea, according to the circumstances of the case, he may by answer insist that he is not obliged to make the discovery. 3 P. W. 238. In this case the plaintiff may except to the defendant's answer as insufficient; and upon that exception it will be determined, whether the defendant is or is not obliged to make the discovery. *Ibid.* 245.

If the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea, 1 Atkyns 54; or if it is doubtful whether as a plea it will hold, the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill. 2 P. W. 145.

Or if the defendant can offer a matter of plea which would be a complete bar,

but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favourable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner. Thus if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favour, which he cannot set forth by way of plea, or of answer to support a plea; as the expending a considerable sum of money in improvements with the knowledge of the plaintiff; it may be more prudent to set out the whole by way of answer, than to rely upon the single defence by way of plea, unless it is material to prevent disclosure of any circumstances attending his title. For a defence which, if insisted on by plea, would protect the defendant from a discovery, will not in general do so if offered by way of answer. 2 *Eq. Ca. ab.* 57. To so much of the bill as it is necessary and material for the defendant to answer, he must speak directly and without evasion; and must not merely answer the several charges literally, but he must confess or traverse the

the substance of each charge. And wherever there are particular precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges. *2 Eq. Ca. ab. 67. Sel. Ca. in Ch. 53. Mit.f 246, 247.*

Thus, where a bill required a general account, and at the same time called upon the defendant to set forth, whether he had received particular sums of money specified in the bill, with many circumstances respecting the times when, and of whom, and on what accounts, such sums had been received; it was determined, that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, was not sufficient; and the plaintiff having excepted to the answer on this ground, the exception was allowed; the court being of opinion that the defendant was bound to answer specifically to the specific charges in the bill, and that it was not sufficient for him to say generally that he had in the schedule set forth an account of all sums re-

ceived by him. *Hepburn v. Durand* 20.
Nom. 1776 in *Chanc.*

Although a defendant by his answer denies the title of the plaintiff, yet in many cases he must make a discovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the discovery. As if a bill is filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes, though the defendant insists upon a modus, or upon an exemption from payment of tithes, or absolutely denies the plaintiff's title (see, however, *Gillb.* 229.), he must yet answer to the quantity of land, and value of the tithes. *Hard.* 130. Or if a bill is filed against an executor by a creditor of the testator, the executor must admit assets, or set forth an account, though he denies the debt. *Hard.* 188.

A counsellor, clerk in court, or solicitor, is not obliged to answer what he knows of his client's case as such; neither is a referee, where it is agreed that what passes

passes in the reference shall not be disclosed or made use of on either side.

Prac. Reg. 8.

Although a defendant by his answer
 An answer usually begins by a refer- Form of answer.
 vation to the defendant of all advantage
 which may be taken by exception to the
 bill, a form which has probably been in-
 tended to prevent a conclusion that the
 defendant, having submitted to answer
 the bill, admitted every thing which by
 his answer he did not expressly contro-
 vert; and especially such matters as he
 might have objected to by demurrer or
 plea. The answers to the several mat-
 ters contained in the bill, together with
 such additional matter as may be neces-
 sary for the defendant to shew to the
 court, either to qualify or add to the case
 made by the bill, or to state a new case
 on his own behalf, next follow, with a
 general denial of that combination which
 is usually charged in a bill. It is the
 universal practice to add, by way of con-
 clusion, a general traverse or denial of
 all the matters in the bill. This is said
 to have obtained, 2 *P. W.* 87, when the
 practice was, for the defendant merely to

set forth his case, without answering every clause in the bill. Though perhaps rather impertinent, if the bill is otherwise fully answered, and it has been determined to be in that case unnecessary (2 *P. W.* 87.); it is still continued in practice. In the case of an infant, the answer is expressed to be made by his guardian; and the general saving at the beginning, together with the denial of combination, and the traverse at the conclusion, common to all other answers, are omitted. For an infant is intitled to the benefit of every exception which can be taken to a bill, without expressly making it; he is considered as incapable of the combination charged in the bill, and his answer cannot be excepted to for insufficiency. The answer of an idiot or lunatic is expressed to be made by his committee as his guardian, or by the person appointed his guardian by the court to defend the suit. An answer must be signed by counsel, unless taken by commissioners in the country, under the authority of a commission issued for the purpose; in which case the signature by counsel is not required, the commissioners

sioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant; which, in fact, was formerly done. *Mitt.* 250.

[illegible]

ruled by the rules of the court, the fact of a Baron is obtained.

Of taking and filing Answers.

Form of an order for time to plead answer and demur.

Answer, how taken.

Before a Baron, or by commission.

A Between A. B. plaintiff and a plea, which is in the nature of an answer, are taken, in this court, either upon the oath or affirmation of the party before a Baron, or by commission empowering certain commissioners therein named to take the same; this indeed depends upon the residence of the party defendant. If he resides in London, or within 15 miles thereof, it is a town cause, and his answer must be taken before a Baron. If he resides above 15 miles from London, then his answer or plea must be taken by commission.

Commission issues either by order, or by the fiat of a Baron.

A commission to take an answer issues either by order of the court, or by the fiat of a Baron; and where the defendant applies to the court for an order for time to plead, answer, or demur, he usually moves for a commission at the same time to take his plea and answer; but where a defendant answers within the time limited

mitted by the rules of the court, the fiat of a Baron is obtained.

Monday the day of 1795.

Form of an order for time to plead, answer, and demur, and for a commission.

Between *A. B.* plaintiff,

And

C. D. E. F. G. H. and *J. K.*

and others, defendants.

By bill.

(*Surry.*) Upon the motion of Mr.

of counsel, on behalf of the defendants above-named, it is ordered by the court, that they have time until the first day of next term to plead, answer, or demur, to the plaintiff's bill; and that a commission do issue to take such plea and answer, the said defendants hereby undertaking not to demur alone.

George, &c. To our beloved *A. B.* *C. D. &c.* (name the defendant's commissioners first, and then the plaintiff's after), greeting; know ye that we have assigned you, and do hereby give to you, or any two or more of you, full power and authority to examine *O. D.* defendant, touching the matters contained in a bill of

Form of a commission to take answers

of complaint lately exhibited against him before the Chancellor and Barons of our Exchequer at Westminster, by M. N. complainant, and to take his answer thereon, and ingross the same on parchment: And therefore we command you, that at such day and place, or days and places, as any two of you shall appoint, you, or any two or more of you, do carefully examine the said defendant, touching the matters aforesaid, upon his corporal oath, to be by him taken on the holy gospels of God before you, or any two or more of you, and do take his answer thereon, and ingross the same on parchment, and that the said defendant do sign the same, and do send the same, taken in form aforesaid, before the Barons of our Exchequer at Westminster, on the day of next, closed up under the hands and seals of any two or more of you, together with this writ, *provided that the above-named R. S. hath six days notice given to him of the time and place of your execution of these presents.* Witness, &c. at Westminster. By order of court made the same day, and by the Barons.

If plaintiff names no names this proviso to be omitted.

In the vacation between Easter and Trinity terms 4 days notice only are given.

Eliot.

Lords

Lords of parliament, as also the wi- Peers, &c. to
dows of temporal Lords, answer upon answer upon
protestation of honour only. honour.

It is ordered by this court, that the following resolution of the House of Lords be inviolably observed by all persons practising in this court; and that the same be recorded in the court. *General order in Scac.*

Die Lune 22do die Maii 1732.

“ Upon report from the Lords com-
“ mittees for priviledges, to whom it
“ was referred on Thursday last to con-
“ sider the priviledges of this house, It
“ is ordered by the Lords spiritual and
“ temporal in parliament assembled, that
“ it is the inherent right of all peers or
“ lords of parliament, whether they be
“ plaintiffs or defendants, to answer or
“ be examined upon interrogatories in
“ all courts upon protestation of honour
“ only, and not upon the common oath;
“ and that the Lord Chancellor or
“ Speaker of this house for the time
“ being, do forthwith give notice of this
“ resolution to the judges in the respec-

Resolution of
the House of
Lords for that
purpose.

“ tive

“twe courts in Westminster-hall, that
 “the same may be inviolably observed
 “for the future, and recorded in the
 “said courts.”

Corporations
 answer under
 their common
 seal.

The answer of a corporation is taken
 under their common seal.

Form of a com-
 mission to take
 the answer of a
 corporation.

George, &c. To our beloved *A. B.*
C. D. &c.: Know ye that we have as-
 signed you, and do hereby give to you,
 or any two or more of you, full power
 and authority to take the answer of the
 mayor, bailiffs, and burgeses, of our
 town of Newcastle upon Tyne, under
 the common seal of the said corporation,
 touching the matters contained in a bill
 of complaint lately exhibited against them
 before the Chancellor and Barons of our
 Exchequer at Westminster, by *M. N.*
 complainant, and to take their answer
 thereon, and ingross the same on parch-
 ment: And therefore we command you,
 that at such day and place as any two of
 you shall appoint, you, or any two or
 more of you, do take the answer of the
 said defendants, in form aforesaid, and
 send the same before the Barons of our
 Exchequer at Westminster, on the

day

day of next, closed up under the hands and seals of any two or more of you, together with this writ, provided, &c. (*as in the former precedent*).

The answer of a quaker is taken upon his solemn affirmation and declaration, and the form, as prescribed by the statute of 19 Geo. 2, ch. 18, is as follows:

Quaker upon his solemn affirmation and declaration.

I, the defendant, D. H. do hereby solemnly, sincerely, and truly, declare and affirm, that I am, and have been for one whole year last past, of the profession of the people called quakers; and do further sincerely and solemnly declare, that I am persuaded in my conscience, that the taking of an oath in any case whatsoever is contrary to the law of God contained in the New Testament, and being thoroughly convinced thereof, I do further sincerely and solemnly declare and affirm, that the answer I here give is in all points true, according as I give the same, and as the same is set forth in this present writing, to which I have subscribed my name, this day of in the year of our Lord 17

Quaker's affirmation.

A Jew is sworn
on the Penta-
teuch.

A Jew is always sworn upon the Old Testament, with the ceremony of wearing his hat whilst the oath is administering.

A commission
to take the an-
swer of a Jew.

The form of the commission to take the answer of a defendant professing the Jewish religion, is in all respects the same as the common dedimus for taking an answer, except the following variation,
“ on his corporal oath, to be by him
“ taken upon the sacred Pentateuch, or
“ five books of Moses.”

Calling for com-
missioners’
names to see an
answer taken.

Before a commission can issue to take an answer, the defendant’s clerk in court must call upon the adverse clerk in court for the names of commissioners to see the answer taken, and to which of them, or to what other person, notice of taking the answer is to be given. This is usually done by a note in writing to the plaintiff’s clerk in court. A week is usually given for a return of the commissioners’ names, and if none are given within that time, a commission may issue *ex parte*. In an injunction cause, a defendant is not to be delayed in this respect, and less time is given to a plaintiff

to

to name his commissioners, as he is supposed to be prepared to give their names upon the first application; and therefore in this case the defendant may, if he pleases, issue the commission *ex parte*; though this is not done but in case of absolute necessity.

The commission being completed, notice of taking the answer may be given in the following form:

Notice of taking
an answer.

" We whose names are hereunto subscribed, having received a commission issuing out of and under the seal of his Majesty's court of Exchequer at Westminster, to us and others directed, to take the answer of *C. D.* defendant, to the bill of complaint of *A. B.* complainant in a cause now depending in the said court. We do, therefore, in pursuance of the said commission, hereby give you notice, that we intend to execute the said commission on *Monday* the *tenth* day of *April* instant, between the hours of one and two in the afternoon, at the house of *M. C.* situate in *Doncaster*, in the county of *York*. At which time and

E e 2

" place

“ place you may be present, if you
 “ please, to see the said answer taken.
 “ Given under our hands the day of
 “ 17 .”

J. S.

J. H.

To Mr. T. W. a commissioner
 on the part of the plaintiff.

One commissioner attending on each side is sufficient for taking the answer; but in case no commissioner should attend for the plaintiff, then any two of the defendant's commissioners may execute the commission.

The answer must be ingrossed on parchment, with a proper stamp upon each skin. The commissioners being met, the defendant (attended by his solicitor) signs his name, in the presence of the commissioners, to each skin, and then one of the defendant's commissioners opens the commission, and interrogates the defendant in the following manner:

“ Have you heard this your answer
 “ read, and do you exhibit the same as
 “ your answer to the bill of complaint
 “ of

“ of *A. B.* ?” The defendant answering in the affirmative, one of the commissioners administers the following oath to the defendant, laying his right hand on the New Testament : “ You shall swear, “ that what is contained in this your answer, so far as concerns your own acts and deeds, is true ; and that what relates to the acts and deeds of any other person or persons, you believe to be true.

“ So help you God,”

The defendant’s answer being thus taken, the commissioners annex the same to the commission, and write at the foot of the answer the following caption :

“ This (plea and) answer was taken, “ and the above-named defendant, *C. D.* “ was duly sworn to the truth thereof on “ the holy Evangelists ; and the demurrer of the said defendant was taken “ without oath at the house of *M. C.* “ situate in *Doncaster* in the county of “ *York*, on the day of in the “ year of the reign of his present Majesty King George the Third, “ and in the year of our Lord one thou-

The caption of an answer, or to a plea, answer and demurrer.

E e 3 “ fand

“and seven hundred and
 “virtue of the commission hereunto an-
 “nexed before us.” &c.

J. S.

J. H.

The commissioners should be precise in the caption of the answer. The joint and several answers of two defendants was on motion suppressed for irregularity; because in the caption it was written *sworn* only, whereas it ought to have been *both sworn*. *Mos. 238.*

The caption of a quaker's answer.

“This answer was taken upon the
 “solemn affirmation of the said de-
 “fendant, C. D. at,” &c.

The caption of an answer of a corporate city or town.

“The answer of the above-named
 “defendants, the mayor, aldermen, and
 “burgesses of the borough of *Doncaster*,
 “was taken under the common seal of
 “the said corporation, as by their said
 “seal affixed appears, at *Doncaster*,” &c.

Caption of the answer of a spiritual corporation.

“The answer of the above-named
 “defendants, the dean and chapter of the
 “cathedral church of *York*, was taken
 “under

“ under the common seal of the said dean
“ and chapter, as by the said seal affixed
“ appears, at,” &c.

“ This answer was taken upon the pro-
“ testation of honour of the above-named
“ defendant, the *Earl of* at,” &c.

Caption of the
answer of a peer.

The caption being subscribed by two
of the commissioners, they indorse on the
commission their return thereof, thus:

“ The execution of this commission
“ appears in a certain schedule (or if
“ more than one skin) in the
“ several schedules hereunto annexed.”

J. S.

J. H.

The commission being annexed to the
answer, the commissioners fold up the
whole, and binding it round with tape,
put their names and seals thereon, with
the name of the cause, adding these
words, “ In the Exchequer,”

Commission to
be annexed
thereto.

The answer is then delivered by one
of the commissioners to a carrier or other
person, who brings it either to the de-

Caption of the
answer to a peer.
And to be deli-
vered by a com-
missioner to
some person to
be conveyed to
London.

There to be delivered on oath before a baron.

defendant's solicitor, or to his clerk in court; and one of them attends the person having the care of it to a baron, before whom he must swear:

"That he received the commission
"from the hands of a commissioner
"therein named, and that the answer
"hath not been opened or altered since
"he so received it."

The baron's clerk then makes the following indorsement:

"Delivered upon the oath of *L. M.*
"at my chambers in *Serjeant's Inn*,
"Chancery-lane before
B. Hotbam."

If the answer be thus delivered before a baron at his chambers, or at his house, a fee of one shilling is paid for the oath; but if it is delivered in court, a fee of two shillings is paid; that is, one shilling for the oath, and one shilling to the ushers of the court.

The answer is then delivered by the baron's clerk to the defendant's clerk in court,

court, who files it, and delivers it over to the plaintiff's clerk in court to be office copied.

If the answer is brought up by one of the commissioners, he must deliver it to the defendant's clerk in court, who accepts it without oath, and indorses it thus : Or by a commissioner.

" Received from the hands of J. S.
" a commissioner."

Fowler.

So it sometimes happens, where a commission is returned in a long vacation, when the barons are upon their respective circuits, that the solicitors on both sides agree, that the answer shall be accepted without the oath of the person charged with the care of it ; in that case it must be thus indorsed. Or consent of parties without oath.

" 10th April 1792.

" Received from the hands of A. B.
" without oath of delivery, by consent
" of the plaintiff's solicitor."

Fowler.

But

Costs of contempt incurred, to be paid before the answer is received.

But should the defendant have incurred any costs of contempt, by not putting in his answer in due time, he must first pay those costs before the plaintiff's clerk in court is obliged to accept the answer.

The answer being thus filed, the plaintiff's clerk in court makes an office copy of it, and then annexes it to the record of the bill, to be afterwards put upon the file of the county in which the cause arises; together with such further answers, amended bills, and other proceedings, as occur in the progress of the cause, until the same is at issue, or shall be discontinued.

Answer taken without oath by order.

The answer of a trustee, or of an amicable defendant, is generally taken without oath; and this is done either by motion on the part of the defendant, by consent of the plaintiff's counsel, or by motion on the part of the plaintiff only, but the latter is more frequently practised, as it is a saving to the plaintiff in costs; after the defendant hath signed his answer it is brought to his clerk in court, who

who marks the record of the answer thus :

" Filed without oath, by order of
" court, bearing date the day of
" 17 ."

Fowler.

An answer taken by commission abroad, returned into this court transcribed upon paper instead of parchment, was, on motion, ordered to be pasted upon parchment in the presence of the defendant's clerk in court, who was afterwards to carry the same to the stamp-office to be stamped, and then to be filed and received by the plaintiff's clerk in court. *Storie v. Armstrong*, 28 Nov. 1764, *Liber. Ordin.*

Answer taken abroad on paper instead of parchment, ordered to be pasted on parchment, and stamped, and then to be filed.

On So, where an answer was taken in Holland in the Dutch language, the defendant not understanding the English language, the court, on motion, ordered that a notary public should be appointed to translate the answer from the Dutch language into the English language; that he should be sworn to the truth of such translation; and

Answer taken in the Dutch language ordered to be translated into the English language, and the original and translation stamped and filed together.

and that the original answer, with the translation thereof, should be stamped and filed together. 9th June 1791. *Gov. and Co. of the Bank v. Salomons, in Scac.* N. B. This was ordered on motion without notice.

Answers which come in after the sittings, are taken as answers of the following term.

Now extended to two days after the sittings.

By the 15th general rule of the court, "all answers coming in after the *setting down of causes* (as the rule expresses "it), are to be taken as answers of the "succeeding term:" but, by the present practice of the court, an answer which comes in within *two* days after the sittings, is accepted as an answer of the preceding term.

Answer of a foreigner residing abroad.

A foreigner residing in England, unacquainted with the English language, swears to his answer

Where a defendant, a foreigner, resides abroad, and puts in his answer in the language of the country in which he is resident; it is the course of the court to apply for an order that such answer may be translated into the English language by a notary public, and that he may be sworn to the truth of such translation; but in the case of a foreigner resident here, and unacquainted with the English language, an answer was first sworn to in the French

French language, and afterwards translated into the English language, to which translation the defendant was also sworn, and the following jurat was written at the foot of the English answer; and an affidavit of the truth of such translation was made by the interpreter, and annexed to both answers.

1st in the French language, and then to a translation in the English language.

“ The defendant being a foreigner, and unacquainted with the English language, was sworn to this answer by the interpretation of *Thomas O’Keeffe* (who was sworn truly to interpret the same), at *Westminster*, the 31st of May 1793.

Jurat to an answer in the French language.

Before *B. Hotham.*”

In the Exchequer.

Between *Felix Bryan Macdonagh*, plaintiff,

And

Viçtoire Adelaide Francois Pastré Melan, widow, defendant.

Affidavit of an interpreter as to the truth of a translation of an answer from the English into the French language.

Thomas O’Keeffe of No. 322 in the Strand, in the county of *Middlesex*, gentleman, maketh oath and faith, that he hath truly and correctly read over and translated

translated to the defendant the bill filed by the plaintiff in this cause: And this deponent further saith, that he hath read over to the defendant the translation in the French language of the English answer of the said defendant hereunto annexed: And this deponent further saith, that the same is a just and true translation of the English into the French language, which said answer is also hereunto annexed.

Thomas O'Keeffe.

Sworn in court at Westminster

the 31st day of May, 1793,

before

A. Macdonald.

The manner of preparing and filing a
 rather answer, either to exceptions, or
 to an amended bill, or to both, is pre-
 pared and filed with the same formalities
 as respect an answer put in to an original
 bill, which have been before treated of
 under the head of taking and filing an-

of

Of further Answers.

A Further answer is in every respect similar to, and indeed is considered as forming part of, the first answer. So is an answer to an amended bill considered as part of the answer to the original bill. 3 *Atk.* 303. Therefore if the defendant in a further answer, or an answer to an amended bill, repeats any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, will be considered as impertinent. *Ibid.* And if, upon reference to the Master, such parts of the answer are reported to be impertinent, they will be struck out as such with costs.

A further answer, what.

The manner of preparing and filing a further answer, either to exceptions, or to an amended bill, or to both, is prepared and filed with the same formalities as respect an answer put in to an original bill, which have been before treated of under the head of taking and filing answers;

How prepared and filed.

swers; and the time allowed by the court for putting in a further answer, is as stated by the foregoing general rule of the 3d of July, 1794.

If the order for amending the bill does not require any further answer, and the amendments be trifling, yet the defendant has a right to answer them.

If the order for amending the bill suggests that the plaintiff requires no further answer from the defendant, yet the defendant may answer the amendments if he pleases, and the plaintiff cannot reply to the former answers until eight days after the bill is amended and delivered over to the defendant's clerk in court.

Words of course preceding a further answer.

The further answer of *C. D.* defendant, to the bill of complaint of *A. B.* complainant.

This defendant, now and at all times hereafter saving and reserving to himself all such advantage of exception to the complainant's said bill, as in and by his former answer he hath saved and reserved for further answer unto the complainant's said bill of complaint, or so much thereof as this defendant is advised materially concerns him to make answer unto,

unto, he this defendant answereth and faith, &c.

And this defendant denies all, and all manner of combination and confederacy wherewith he is charged, without that, that there is any other matter, or thing, in the said complainant's bill of complaint contained, material or effectual in the law for this defendant to make answer unto, and not herein, or in his former answer, answered unto, confessed or avoided, traversed or denied, is true: All which matters and things this defendant is ready to aver and prove as this honourable court shall direct, and humbly prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

Words of course
at the conclu-
sion.

J. S.

The further answer of *C. D.* defendant, to the amended bill of *A. B.* complainant.

Words of course
preceding an
answer to an
amended bill.

This defendant, saving and reserving to himself as in and by his former answer he hath saved and reserved for answer to the said complainant's said

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F f

amended

amended bill, or to so much thereof as this defendant is advised is necessary or material for him to make answer unto, he answereth and saith, &c.

Conclusion.

And this defendant denies all, and all manner of unlawful combination and confederacy in the said complainant's said amended bill charged, without that, that there is any other matter, or thing, in the said complainant's said amended bill of complaint contained, material and effectual for this defendant to make answer unto, and not herein and hereby sufficiently answered unto, confessed, avoided, traversed, or denied, is true to the knowledge and belief of this defendant: All which matters and things this defendant is ready to aver, maintain, and prove, as this honourable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

J. M.

Answers

Answers amended by a Supplemental Answer.

THERE are no settled rules for the amendment of answers. It is merely discretionary in the court, and the cases which have ordinarily met with the indulgence of the court, have been such mistakes in answers as have arisen from meer inadvertency in the defendant; as the mistake in a fact, a date, or a sum of money; or in a *modus* not being laid in the answer agreeably to the fact; or where the ingrossment of the answer has differed from the original draught. These, and such like, mistakes in answers being made apparent by affidavit, the court have permitted the defendant to put in a supplemental answer before, and in some cases after, issue joined upon payment of costs.

No settled rules in the amendment of answers; but are amended at the discretion of the court.

Ordinary cases of amendments.

Bill was brought for a commission to ascertain the bounds of leasehold lands belonging to the *Bishop of Ely*, inter-

Answer amended in a mistake in the ingrossment.

mixed with freehold lands belonging to the defendant *Kenrick*; the other defendant, *James* (who was steward to *Kenrick*), by the draught of his answer swore, that twenty-five or thirty acres had, thirty-five years ago, been allotted to the bishop: in the ingrossment it was by mistake made two hundred and fifty or three hundred, and so sworn. On motion to amend the answer, grounded upon an affidavit of the mistake, it was ordered *per totam curiam*. *The Bishop of Ely and others v. James and others*. 12th Feb. 1730. *Bunb.* 295.

Answer amended
after issue
joined.

A defendant had leave given to amend an answer to a tithe bill, wherein he had sworn, that such a close contained *nine* acres, and to make it *seventeen*, though issue was joined, and a commission had issued (which the reporter says he never knew done before); but it was upon the defendant's paying all the costs since the answer, swearing the answer over again, and taking out a new commission at his own expence. *Berney v. Chambers*, 24 Feb. 1727. *Bunb.* 248. But, *nota*, says the reporter, in the case of *Mr. Wortley Mountagu*, the court refused to let the defendant

defendant amend his answer by only altering the day of payment of a *modus*, although issue was not joined, and the day set right in the cross bill.

Mr. Scott moved for the defendant *Elliott* that he might be at liberty to rectify a mistake in his answer by putting in a further answer, and that he might have a commission to take it. The mistake stated to be made in his answer was as follows:

Answer amended as to a *modus* after issue joined.

“ That the farm called *Reedswood* is
 “ an ancient farm, situate in the district of
 “ *Bellingham*, within the rectory and parish
 “ of *Simonburne*; and that the defendant
 “ had then been informed, and verily
 “ believed, there ever had been yearly
 “ paid to the rector of the said parish
 “ for the time being, at Easter, the
 “ yearly sum of one penny, called a Hay-
 “ penny.”

And that the following words might be substituted in his further answer in lieu thereof:

“ That the said farm, known by the
 “ name of *Reedswood*, comprizes two

F f 3

“ ancient

“ ancient farms severally called *Reeds-*
 “ *wood*, and for which, of each farms,
 “ this defendant hath been informed, and
 “ verily believes, there ever had been
 “ yearly paid to the rector of the said
 “ parish for the time being, at Easter, the
 “ sum of one penny, called a Hay-
 “ penny.”

Mr. *Burton* opposed this motion, upon the danger of the precedent in giving leave to amend an answer in this particular, especially after issue joined; but, upon an affidavit of the defendant accounting for the mistake, the court granted the motion, and ordered the defendant to put in his answer forthwith, with liberty to the plaintiff to reply to the amended answer, and to exhibit a new interrogatory, adapted to the amendment, that a new commission should issue for the examination of witnesses in consequence thereof, if the plaintiff should be so advised, at the expence of the defendant, who was ordered to pay the plaintiff all his other costs occasioned by the amendment. *Dr. Scott v. Allgood and others*, 12th Feb. 1788, in *Scac. MS.*

Mr.

Mr. *Burton* moved, that the defendant, who was an executrix, might be at liberty to amend her answer in various parts of the schedules marked *A* and *B*. Two affidavits were produced in support of this application, one made by the defendant, the other by the clerk to her solicitor. The clerk in his affidavit pointed out the several omissions and errors made in the schedules, and which he stated to have arisen from the great hurry of putting in the answer in time; that the mistakes consisted of mere clerical errors made in copying the accounts contained in books into the schedules. And the defendant by her affidavit swore, that the errors now discovered by her, in the schedules to her answer, were made by the clerk who copied the schedules, and that such mistakes were not made by her with any improper design or intention whatever.

The schedules to an answer permitted to be amended, the mistakes having arisen in copying.

Mr. *Plumer* opposed this motion on the part of the plaintiff; but the court gave the defendant leave to amend her answer as to such omissions and errors specified, by adding an explanatory answer as to such omissions and errors, and

ordered it to be annexed to her former answer; and that when the same was sworn, the defendant's clerk in court should deliver the same, with an office-copy thereof, to the plaintiff's clerk in court, at the expence of the defendant. *Reeve v. Miller, 27th July, 1791, in Scac. MS.*

In what cases
answers amend-
ed and re-sworn.

It was moved, on the part of the plaintiff, to suppress the defendant's answer, the caption thereof being dated in 1741 instead of 1751, and the defendant was ordered to shew cause. On shewing cause it appeared to be a manifest mistake, and the defendant moved to amend the caption of the answer, to take it off the file, and to re-swear it; which the court ordered, and that the clerk in court for the defendant should attend the Baron with the answer. *Sher-ratt v. Trufler, 30th April, 1751, in Scac.*

So where the place of taking the answer was omitted in the caption of it, the answer was ordered to be taken off the file, and sent down to be retaken. *Jenner v. Asbley, 15th June, 1737. Lib. Ordin. in Scac.*

By

By rectifying a mistake in the title of it. *Woodger v. Crumpter*, 7th June, 1769. *Ibid.*

By correcting a mistake in the name of a party. *Keen v. Stanley*, 1 Feb. 1766. *Ibid.*

By adding to the title the name of a plaintiff omitted. *Wright v. Campbell*, 6th May, 1778. *Ibid.*

By striking out the words *in this honourable court*, and inserting, instead thereof, the words *in the high court of Chancery*, and for a commission to retake the answer. *Lloyd v. Mytton*, 31st Oct. 1749. *Ibid.*

By annexing the schedules therein referred to, and to re-swear the same. *Bryan v. Truman*, 26th Jan. 1781. *Ibid.*

It was moved by Mr. *Mitford*, upon an affidavit, for leave to take the answer off the file and amend it, and for a commission to re-swear it so far as respected the disclaimer in the answer. Mr. *Ainge* for the plaintiff opposed this motion upon

Amendment of answer after issue joined refused, as it tended to vary the defence.

upon the following grounds: that the cause was at issue; that a commission was issued for the examination of witnesses; and that by permitting the answer to be amended in the particular article required, it would not only vary the defence, but derange the whole of the plaintiff's evidence, and the interrogatories which were adapted to it in support of his case; and for the sake of precedent it ought not to be done. *Per curiam*.—The cases in which leave has been given to amend an answer have been, where a mistake has been made in the true sense of the word, and not where a defendant has mistaken the nature of his defence. *N.B.* This was a tithe cause, and the court asked, if the mistake desired to be rectified affected the rights of the defendant's successor? But that not appearing to be the case, the court refused to grant the motion. Upon this occasion Mr. Scott, as *amicus curie*, informed the court, that the then Chancellor, Lord Thurlow, had very lately permitted a defendant, who was an executor, to amend his answer, by striking out the admission of assets come to his hands. *Roberts v. Roberts, in Chan.*

Scandal

Scandal and Impertinence in Bills or Answers.

IT is an established rule, that nothing relevant is considered as scandalous. What is relevant is not scandalous.
2 Vez. 24. And any thing is relevant which may be proved in the cause.

After an answer is come in, it is too late to refer the bill for impertinence, but never too late to refer it for scandal. After answer bill cannot be referred for impertinence, though it may be for scandal.
Bunb. 53, 304.

If a party appears to a bill, and obtains an order for time to answer, he cannot afterwards refer the bill for impertinence, though he may for scandal. Bill cannot be referred for impertinence after an order for time. *2 P. W. 311. 1 Vez. 24, 631.*

A defendant obtained an order to refer the plaintiff's amended bill for impertinence, after he had obtained an order for time to answer it. For this irregularity Mr. *Lloyd* moved to discharge the order of reference for impertinence. Mr. *Popham* for defendant.

The

The order of reference was discharged, the order for time being a submission to answer the bill. *Malby v. Phillot*, 26th Feb. 1788, in *Scac.*

After exceptions to answer it cannot be referred for impertinence.

So, after exceptions are taken to an answer for sufficiency, it cannot be referred for impertinence, though it may for scandal. 2 *P. W.* 312.

Exceptions to the master's report must specify in what particulars the answer is scandalous or impertinent.

If the plaintiff refers the answer for scandal and impertinence, and the master finds the answer neither scandalous nor impertinent, the plaintiff, on excepting to the master's report, must, in his exceptions, shew wherein, in what line or page, and how far, the answer is scandalous and impertinent, in order that such part of the answer may be expunged; and it is not sufficient in the exceptions to say in general, that the answer is scandalous and impertinent. 2 *P. W.* 181.

In what manner an order is obtained to refer a bill or answer for scandal or impertinence, or both.

Where a bill or answer reflects scandal upon any of the parties to the suit, or otherwise, or contains any impertinent matter not relevant to the question in the cause, it is a motion of course to refer

refer it to the master, to see whether such bill or answer be scandalous or impertinent, or both, and to report his opinion thereon to the court.

the day of 172 .
Between *A. B.* plaintiff,
and
C. D. defendant.

By bill.

Upon the motion of Mr. [unclear] of counsel on behalf of the plaintiff, informing the court, that the said defendant had lately filed his answer to the plaintiff's bill, and that the said plaintiff was advised, that there were several scandalous and impertinent matters and clauses contained therein; it was therefore prayed, that it might be referred to the Deputy to his Majesty's Remembrancer of this court to look into the said answer, and to report to the court if there are any and what clauses or matters contained in the said answer which are scandalous or impertinent. Which is by the court hereby ordered accordingly.

This

Form of the order of reference.

Proceedings
thereon.

This order being served on the adverse clerk in court, and entered with the register, an office copy thereof is left with the master, and three warrants are taken out before him in the usual way, the last being attended generally by counsel on both sides. If the master should be of opinion that the bill, or answer, which is the subject of the reference, does not contain scandal or impertinence he prepares his report accordingly, and the party dissatisfied with his report may take objections in writing thereto, and proceed before him thereon by counsel; and if the master should overrule the objections, they are then turned into the form of exceptions, without any other variation, and are set down in the paper to be argued before the court for its final decision.

If the exceptions are disallowed, the report is consequently confirmed with costs to be taxed.

These costs when taxed are to be paid forthwith, and if they are not paid agreeably to the *allocatur*, a *subpoena* issues to demand them of the party; and upon an affidavit

affidavit of service, and refusal of payment to the other party, or to his attorney duly appointed to receive them, the court will, on motion, in the first instance, order an attachment against the party so refusing the payment of such costs.

If a bill or answer be referred for scandal, and reported by the master to be scandalous, and he has once expunged the scandal, the party cannot then except to the report; because, when the scandal is once expunged, it cannot be made appear to the court what the scandal was, and it was the party's own fault that he did not except to the report in time.

P. W. 182.

An order was obtained by the defendants, who were commissioners of the navy, to refer the bill for impertinence.

On the reference the master reported the bill impertinent. The plaintiff took exceptions to his report; which came on to be argued before the court. The impertinent matter complained of, and which swelled the bill to a great length, were charges of conversation suggested to have passed in the course of making their

In what particular the court held a bill to be impertinent.

their contract with the plaintiff for certain large quantities of grain for the use of the navy; and to these charges the defendants were particularly interrogated; but they contended that, as commissioners of a public board, acting for the public, they were not bound to answer them. Mr. Mansfield, Mr. Scott, and Mr. Dallas, argued the exceptions on the part of the plaintiff. Mr. Attorney General, Mr. Solicitor General, Mr. Newham, and Mr. Lloyd, for the defendants. *Per curiam*, commissioners of public boards can only speak from their minutes, orders, reports, and other official documents which respect the business of the board of which they are commissioners; and they are not bound to answer to loose conversations in their individual capacity. Whereupon the exceptions were overruled, and the master's report was confirmed. *Atkinson v. The Commissioners of the Navy*, 31st Jan. 1789, in *Scac. MS.*

Costs in what manner taxed when the answer is reported scandalous.

The defendant's answer was referred for scandal, and was reported by the master to be scandalous, and the plaintiff's costs were ordered to be taxed; the plaintiff

plaintiff, in the taxation of costs, had allowed to him several items of twenty-one pounds six shillings, and three pounds, as fees given to counsel, although he did not pretend that such sums had been really given; but it was alledged, and so admitted now, that it was the constant method in Chancery to allow costs in this manner, by way of damages and satisfaction to the party for the scandal; the whole in this case that was thus itemed to counsel, amounted to sixty pounds, which this day the court would not alter; but upon the 8th of May they thought it too extravagant, and reduced it to forty pounds. *Chambers v. Robinson, Bunb. 164.*

A defendant having obtained an order to dismiss the bill for want of prosecution unless cause, the plaintiff moved to refer the answer (which plaintiff had not replied to) for scandal and impertinence. It was objected by the counsel for the defendant that the length of time which had intervened ought to be considered as a waiver of his right to refer; and that there was a distinction between a reference for scandal, and a reference for im-

Answer referred
for imperti-
nence after an
order to dismiss.

pertinence. On the part of the plaintiff the case of *Kenworthy v. Allen*, 1 Bro. 400, was relied on as in point, unless a difference in practice could be shewn to have prevailed in this court, which the defendant not being able to do, the court ordered the answer to be referred as prayed by the motion; intimating that a party might refer for impertinence at any time before he had taken a step in the cause, *i. e.* a bill might be referred for impertinence before answer, and on an answer before replication, but not afterwards. For scandal at any time. *Wallis v. Atkinson*, 8th July 1794, in *Scac.* MS.

How

How particular Persons are to defend.

IT hath been before observed, that Attorney-General, when the interest of the crown, or of those whose rights are under its particular protection, is concerned in the defence of a suit, the King's Attorney-General, or, during the vacancy of that office, the Solicitor-General, becomes a necessary party to support that interest. In like manner the Queen's Attorney or Solicitor-General is the party necessary to defend her rights.

Where the Attorney-General is made Mode of proceeding. a defendant to a bill, in which the rights of the crown are affected, in order to obtain an appearance and answer thereto, he must be first attended with a *subpana* and an office-copy of the bill, to which he will order an appearance to be entered of course.

His answer is signed by him, but is His answer to be put in without oath. always put in without oath, whether it

be a general or a special answer, but he proceeds in his defence as other defendants.

Attorney-Gen. permitted to withdraw his general answer, and put in another, insisting on the particular right of the crown.

The Attorney-General put in the common answer, viz. that he was a stranger to the matters in the bill, and that he hoped the interest of the crown would be taken care of, &c. In the further prosecution of the cause, the Attorney-General obtained an order that he might be at liberty to withdraw his general answer, and put in another answer, insisting on the particular right of the crown to the money in question. *Bunb. Rep.* 303.

He cannot be attached for want of appearance or answer.

As contumacy cannot be imputed to the person who holds the office of Attorney-General, so he cannot be attached for want of an appearance or answer. But if he delayed putting in his answer beyond a reasonable time, it was the ancient course of this court (and not contradicted by modern practice) for the plaintiff to move, that the court would appoint a short day for the Attorney-General to answer the bill, or, in default, that

that it should be taken *pro confesso*. So ruled in the following cases. *Poole v. The Attorney-General*, 28th April, 1694. *Walker v. The Attorney-General*, the same day. And again in *Poole v. The Attorney-General*, 6th July, 1694. *Liber Ordin.*

in *Scac.* stranger to the matter in the bill, and put in another answer, insisting on the particular right of the crown to the money in question. further protection of the cause, the Attorney-General obtained an order that he might be at liberty to withdraw his general answer, and put in another answer, insisting on the particular right of the crown to the money in question.

As contumacy cannot be imputed to the person who holds the office of Attorney-General, he cannot be attached for want of an appearance or answer. But if he delayed putting in his answer beyond a reasonable time, it was the ancient course of this court (and not contrabicted by modern practice) for the plaintiff to move that the court would appoint a short day for the Attorney-General to answer the bill, or in default

G g 3

Defence

Defence by Answer,---Baron and Feme.

Answer by husband and wife.

WHERE the husband will answer to the prejudice of the wife, who is an executrix, the court, on motion, will give leave for her to answer separately. *2 Eq. Ca. Abr. 66.*

The wife's answer not to prejudice the husband.

The wife's answer not prejudicial to the husband where he denied the trust, and she confessed it; and though one witness proved it, yet the bill was dismissed. *2 Ch. Ca. 39.*

Answer of a feme covert equal to a fine.

An answer in equity put in by a *feme covert*, the late Lord Chancellor King declared, was equal to a fine passed by her at common law. *Moseley's Rep. 248.*

Answer by husband and wife, and he only answers, an attachment may issue against both.

If the husband and wife have appeared, and he only answers, an attachment may issue against both when the time for answering is out, unless there be an order for him and his wife to answer separately. For though the wife is not ordinarily to answer

answer without the husband, yet in special cases the court will order that she shall answer alone, without which order a sole answer made by her will be suppressed. *Prac. Reg.* 23.

Bill against husband and wife, for a demand out of the separate estate of the wife, and the husband beyond sea, and not amenable by the process of the court, yet, if the wife be served with a *subpœna*, she must appear and answer. 2 *Vern.* 613.

Bill for a demand out of the separate estate of the wife, and the husband beyond sea, the wife shall appear and answer.

So where a wife was made a co-defendant with her husband, and refused to appear, her husband being abroad, and out of the jurisdiction of the court, the estate in question being the separate estate of the wife, the court ordered an attachment against the wife alone to compel her to appear. *Tugwell v. Boughton*, 19th Dec. 1788, in *Scac. MS.*

The wife refusing to appear, the husband being abroad, an attachment ordered against the wife.

The wife is frequently put to answer alone where the husband is beyond sea. *Toth.* 13. Or where she lives separate from her husband, she is after ordered to answer alone. 1 *Cb. Rep.* 68.

Answer of a
feme covert per-
mitted to be
filed without a
guardian, she
not being able
to procure one.

Although the rule is, that a *feme covert*, in the absence of her husband, must answer by her guardian, that there may be somebody answerable for the costs, yet, upon an affidavit made, that her husband, since he entered his appearance, was run away, and could not be found, that she had applied to all her friends and acquaintances to be her guardian, but that all had refused, because she could not give security to indemnify them against the costs; in this case of necessity the court gave leave to file her answer without a guardian. *Glover et al. v. Eliz. Young. Bunb. Rep. 167.*

If the wife's answer differs from the husband's, she must put in an answer as such; and there is no instance of appointing a guardian to put in her answer in such case. 3 *Atk.* 478.

A husband bringing his bill against his wife is admitting her to be a *feme sole*; and she must put in an answer as such; and there is no instance of appointing a guardian to put in her answer in such case. 3 *Atk.* 478.

Husband allowed to answer without the wife.

Bill against husband and wife, the husband moved for liberty to answer without his wife, upon an affidavit made, that she declared she would not answer with her husband, but that she loved the plaintiff better, and would stand by him; which

which was ordered accordingly. *Mur-*
riet v. Lyon and Wife. Bund. 175.

But if a *feme covert* cannot in confi-
dence consent to such an answer as is drawn
up by the husband, she is not obliged to
submit to it. Upon application to the
court she may be considered as a sepa-
rate person, and will be allowed to an-
swer distinct and independant of her
husband. And where a husband prevails
on a wife to put in an answer contrary
to what she believes is the fact, he may
be punished for a contempt. *2 Atk. 50.*

Feme covert may
answer alone, if
she cannot in
confidence an-
swer with her
husband.

If the wife's answer differs from the
husband's it shall not prejudice the hus-
band, as if she confesses a trust which he
denies, *1 Ch. Ca.* for she can be no wit-
ness against her husband. *2 Vern. 79.*

Answer of wife
shall not preju-
dice the hus-
band.

Bill against husband and wife, the
husband moved for liberty to answer
without his wife, upon an affidavit made
that the declared she would not answer
with her husband, but that she loved the
Defence
plaintiff better, and would stand by him;

Defence by Answer,--Infant and Guardian.

Infants, by whom they may defend.

INFANTS institute a suit by their next friend; but to defend a suit the court appoints them guardians, who are usually their nearest relations, not concerned in point of interest in the matter in question. If a person is by age or infirmity reduced to a second infancy, he may also defend by guardian. *Preced. in Chan.* 429.

Infants, how compelled to appear and answer.

An infant appears to the bill without a guardian, but he must answer it by his guardian duly appointed by the court. Instances of contumacy to the court are rare in an infant defendant; but if, being served with a *subpœna*, he neglects or refuses to appear, upon an affidavit of service, an attachment may issue against him; and upon motion, stating the infant's contempt, and producing the attachment, the court will order a messenger to bring the infant into court; and, upon being brought into court, should

no

no one then offer to be assigned his guardian, the court usually appoints one to appear to the bill, and answer and defend the suit. So if an infant appears to a bill, and refuses to answer it, an attachment issues against him for not answering; and the like course must be pursued as before for want of an appearance.

An infant defendant residing in *London*, Guardian to an infant, how appointed. or within 15 miles thereof (which is a town cause), the guardian is appointed either by a Baron in court, or at his chambers, upon a personal attendance of the parties. Under this election of a guardian, an order is not necessary, because this appointment by a Baron is considered as the act of the whole court. But where the infant resides fifteen miles from *London*, the guardianship of the infant is appointed by commission, for which an order must be obtained.

The above-named *A. B.* is admitted by the court of Exchequer guardian, and next friend to *C. D.* being an infant under the age of twenty-one years, to defend this cause, and therefore was
sworn

Form of the appointment by a Baron.

sworn at *Serjeant's-Inn* the _____ day of
1795, before me

and *B. Hotbam.*

General admission of a guardian to prosecute or defend.

As a guardian may be appointed to defend for an infant in a particular cause, so he may be admitted generally, either to prosecute or defend his rights; for this purpose the infant must be brought before a Baron, and asked if he approves of the person so to be appointed his guardian, and if he signifies his approbation the guardian is accordingly sworn. In this choice an infant is supposed to be of an age capable of making it

Form of a general admission.

A. B. being an infant, under the age of twenty-one years, is admitted by *C. D.* of _____ in the parish of _____

his guardian, to prosecute and defend all and all manner of suits, actions, and pleas, in his Majesty's court of Exchequer, during the minority of the said *A. B.* Dated the _____ day of _____

1795. _____ *B. Hotbam.*

Mon-

Monday the day of 1795.

Form of the order for a commission.

Between *A. B.* plaintiff,

and

C. D. an infant under the age of twenty-one years, and others, defendants.

By bill.

(*Surry.*) Upon the motion of Mr. of counsel, on behalf of the above named defendant, it is ordered by the court, that a commission do forthwith issue, under the seal of this court, empowering certain commissioners, to be therein named, to elect, assign, and appoint, a guardian for the said infant, and also to take the answer of such guardian, on behalf of the said infant, to the said bill.

George, &c. To our beloved *A. B.* &c. greeting: Know ye, that we have assigned you, and do hereby give to you, or any two or more of you, full power and authority to call before you, or any two or more of you, *C. D.* an infant, under the age of twenty-one years, who hath appeared in our court of Exchequer

Form of the commission to appoint a guardian, and also to take the answer of other defendants with such guardian.

quer at *Westminster* to a certain bill of complaint lately exhibited by *G. H.* complainant, before the Chancellor and Barons of our said court, against the said infant, and also against *J. K.* and *L. M.* defendants, and to elect, assign, and appoint, a guardian for the said infant, by whom he may defend the said suit; and such guardian so elected, assigned, and appointed, and the said other defendants *J. K.* and *L. M.* to examine touching the matters contained in the said bill, and to take their answers thereon, and ingross the same on parchment; and that the said guardian, and also the said other defendants *J. K.* and *L. M.* do sign the same: And therefore we command you, that at such day and place, or days and places, as any two of you shall appoint, you, or any two or more of you, do call before you the said infant, and do elect, assign, and appoint, a guardian for him, and do carefully examine such guardian so elected, assigned, and appointed, and also the said other defendants *J. K.* and *L. M.* touching the matters contained in the said bill, upon their corporal oaths to be by them taken on the holy gospels of God, and do send the

the same, taken in form aforesaid, before the Barons of our Exchequer at *Westminster*, on the day of next, closed up under the hands and seals of any two or more of you, together with a certificate of your election and appointment of such guardian, and this writ, provided that the above-named *P. Q.* hath *six* days * notice given to him of the time and place of the execution of these presents. Witness, &c. By order of Court made the same day, and by the Barons.

Eliot.

(Indorsed.)

Fowler.

To be thus indorsed by the Commissioners present: When executed.

“The execution of this commission appears in a certain schedule hereto annexed.”

A. B. J. K. L. M.

To the Right Hon. Sir *Archibald Macdonald*, Kt. Lord Chief Certificate of the commissioners.

* In Easter term vacation *four* days.

Baron

Baron of his Majesty's court
of Exchequer at *Westminster*,
and to the rest of the Barons
of the same court.

These are to certify the Barons of his
Majesty's court of Exchequer at *West-*
minster, that by virtue of the commis-
sion annexed to this answer, to us and
others directed, we have, in the presence
of the above-named *C. D.* an infant,
under the age of twenty-one years,
elected, assigned, and appointed, *J. T.*
guardian to the said infant, and the
said *J. T.* as guardian to the said infant,
and the said other defendants *J. K.* and
L. M. were duly sworn to this answer on
the holy gospels of God, at the house of
known by the sign of the
situate in the town of in the county
of the day of in the
year of our Lord 1795, before us,

A. B.

T. L.

M. K.

(To be written at the foot of the answer.)

Oath to be made
on delivering
the answer be-
fore a Baron.

Upon the return of the answer to *Lon-*
don, oath must be made before one of
the

the Barons, by the person having the carriage of it, that he received the answer from *A. B.* one of the commissioners, that it hath not been opened or altered by him; nor hath it been out of his custody since he so received it.

The answer being left with the Baron, it is afterwards delivered to the defendant's clerk in court, who files it in the usual manner. In this state it is delivered over to the plaintiff's clerk in court.

In what manner filed.

Exceptions cannot be taken to an infant's answer, because he is not bound by it, but may amend it when he comes of age. *Strudwick v. Pargiter, Bunb. 338.*

Exceptions cannot be taken to the answer of an infant.

The answer of an infant may be referred for scandal; but it being upon the oath of the guardian, he, and not the infant, shall be liable to pay the costs, or rather the counsel who signed such answer.

Answer of an infant may be referred for scandal or impertinence.

So in the case of a lunatic, or person of a weak mind, who answers by guardian.

So may that of a lunatic, or person of weak mind.

A new guardian
may be appoint-
ed on the death
of the former.

Where a guardian happens to die after answer, pending the suit against the infant, upon an affidavit of the death of the guardian the court, on motion, will of course order a commission to assign a new guardian, the guardian formerly assigned being dead.

Form of a com-
mission to assign
a new guardian
upon the death
of the former
guardian.

George the Third, &c. To our beloved, &c. greeting: Whereas *A. B.* complainant, hath lately exhibited his bill of complaint before the Chancellor and Barons of our court of Exchequer at Westminster, against *C. D.* defendant, to which bill the said defendant appeared; but forasmuch as the said defendant being an infant, under the age of twenty-one years, could not answer the said bill nor defend this suit without having a guardian assigned him in that behalf, whereupon a commission duly issued out of our said court to assign him a guardian for that purpose, and he accordingly put in his answer by *J. S.* his guardian, who is since dead, as we are informed: Know ye, therefore, that we have assigned you to be our commissioners, and do hereby give to you, or any two or more of you, full power and authority to call before you,

you, or any two or more of you, *C. D.*
 an infant under the age of twenty-one
 years, and to elect, assign, and appoint,
 a new guardian for the said infant, by
 whom he may defend the suit: And
 therefore we command you, or any two
 or more of you, that at such day and
 place as you shall think proper, you, or
 any two or more of you, do call before
 you the said infant, and elect, assign, and
 appoint, a new guardian for him; and
 when you shall have so done, that you,
 or any two or more of you, do certify
 the name of such guardian, and your
 election and appointment of such guar-
 dian, ingrossed on parchment, and send
 the same closed up, under your seals, or
 the seals of any two or more of you, to
 the Barons of our said Exchequer at
Westminster, on the day of to-
 gether with this our writ: Witness, the
 Right Hon. knight,
 at *Westminster*, the day of in
 the thirty-second year of our reign. By
 order of court made the same day, and
 by the Barons.

Eliot.

(Indorsed)

Fowler.

H h 2

This

This commission issues *ex parte*, and the person proposed as guardian appearing, upon enquiry by the commissioners, to be a proper person, they accordingly appoint such person to be guardian to the infant, and to defend the suit on his behalf.

Form of the certificate.

To the Right Honourable Sir *Archibald Macdonald*, knight, Lord Chief Baron of his Majesty's court of Exchequer at *Westminster*, and to the rest of the Barons of the same court.

Between *A. B.* plaintiff,
and

C. D. an infant under the age
of twenty-one years, defendant.

We whose names are hereunto subscribed, in pursuance of a commission to us and others directed, humbly certify, that we have caused *C. D.* the infant, to come before us and *P. L.* of in the county of being proposed to us as a proper person to be his guardian, we have accordingly assigned and appointed the said *P. L.* to be the new guardian to the said infant, in the room
of

of J. S. deceased, at the house of
innholder, in in the said county,
the day of 17 by virtue
of the said commission, and which is
hereunto annexed.

R. S.

T. C.

This certificate being ingrossed on an
half-crown stamp, and annexed to the
commission, the following return is in-
dorsed upon the commission, and sub-
scribed by the commissioners :

Return indorsed
on the commis-
sion.

The execution of this commission ap-
pears in a certain schedule hereto an-
nexed.

R. S.

T. C.

The commission and certificate being
closed up, under the seals of the com-
missioners, they are either delivered by a
commissioner to the clerk in court for
the infant, or delivered with the usual
formality before a Baron ; and then the
clerk in court files and annexes the
commission and certificate to the answer
put in by the former guardian, so that

H h 3

the

the regularity of these proceedings may appear upon record.

Lands in fee descending to an infant, the parol shall demur in equity as well as at law.

Where lands in fee descend on an infant, the parol shall demur in equity as well as at law, because an infant is equally incapable of defending himself in one court as in the other; and the equitable assets may be of as great value as the legal; but a special occupant under the statute of frauds, shall not have his age so as to make the parol demur. 3 P. W. Rep. 368.

Infants after attaining 21, in what cases permitted to put in new answers.

An infant had put in an answer by consent without oath, but having now attained the age of twenty-one, it was moved by Mr. *Simeon* on notice, that she might be at liberty to put in a supplemental answer upon oath, and to annex the same to her former answer; which was ordered accordingly. *Russell v. Meredith*, 28th Feb. 1795, in *Scac. MS.*

So where an infant defendant put in an answer by his guardian, having attained twenty-one, moved that he might have

have leave to put in an answer upon oath, and to annex it to his former answer, which the court ordered. *Strutt v. Woodcock*, 19th June 1795.

N. B. In this case it was suggested, that the reason for putting in this new answer was to admit the execution of a will, which must otherwise have been proved.

Infant and Prochein Amy.

Infant incapable of exhibiting a bill by himself.

AN infant is incapable by *himself* of exhibiting a bill, as well on account of his supposed want of discretion, as his inability to bind himself, and to make himself liable to the costs of the suit. *Strange* 708.

But may exhibit a bill by his next friend.

When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the extraordinary jurisdiction of a court of equity, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights, or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant, is therefore termed his *next friend*. But, as it frequently happens that the nearest relation of the infant himself with-holds the right, or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the court, in favour of

of infants, will permit any person to institute suits on their behalf. *Prec. in Chan.* 376. 1 *Atkyns* 570. And whoever acts thus the part which the nearest relation ought to take, is also styled the next friend of the infant, and as such is named in the bill. *Mitf. on Plead.* 25.

The next friend is liable to the costs of the suit. *Mosely* 47, 86. 2 *Eq. Ca. Ab.* 238. And to the censure of the court if the suit is wantonly or improperly instituted. *Mitf. on Plead.* 26.

Prochein amy liable to costs if suit is improperly brought.

But if the infant attains twenty-one, and afterwards thinks proper to proceed in the cause, he is liable to the whole costs. *Strange* 708. 2 *Eq. Ca. Ab.* 238. 2 *P. W.* 297.

But if after 21 the infant proceeds, he alone is liable to costs.

The next friend of an infant plaintiff is considered as so far interested in the event of a suit, that he or his wife cannot be examined as a witness. 3 *Atk.* 511.

Neither prochein amy nor his wife can be examined as witnesses for the infant.

If their examination is necessary for the purposes of justice, his name must be struck out of the bill, and that of another

But if it be necessary, his name must be struck out of the bill, and another substituted.

other responsible person substituted, which the court upon application will permit to be done. *Strange* 708.

If the suit is reported not to be for the infant's benefit proceedings will be stayed.

As some check upon the general licence to institute a suit on behalf of an infant, if it is represented to the court that a suit preferred in his name is not for his benefit, an enquiry into the fact will be made by the master, and if he reports that the suit is not for the benefit of the infant, the court will stay the proceedings. *3 P. W.* 140. *Mitf. on Plead.* 27.

Two suits for the same purpose by different persons, that suit to be proceeded in which is most for the infant's benefit.

If two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the court will direct an inquiry to be made in the same manner which suit is most for his benefit; and when that point is ascertained, will stay proceedings in the other suit. *Ibid.*

Mistake by an infant in his bill, the court will order an amendment.

If there be a mistake by an offer of an infant in his bill, the court will take care of him, and direct an amendment of the bill. *2 P. W.* 386, 7.

A bill

A bill may be brought in behalf of an infant *en ventre sa mere*, and an injunction to stay waste obtained. 2 Vern. 711.

Bill may be brought on behalf of an infant *en ventre sa mere*.

An infant may, by his *procbein amy*, call his guardian to an account even during his minority; and if a stranger enters, and receives the profits of the infant's estate, he shall in this court be looked upon as a trustee for the infant. 2 Vern. 342.

And may call his guardian to an account during his minority.

Where one receives the profits of an infant's estate, and he neglects to enter within six years after he comes of age, he is as much bound by the statute of limitations from bringing a bill for an account of profits, as he is from an action of account at law. *Preced. in Chan.* 518.

Infant in what case barred by the statute of limitations.

One borrows money during his infancy, and applies it to the buying of necessaries, and afterwards coming to age, delivers his lands to trustees for payment of his debts with interest, and dies, the debt contracted during infancy is within the trust. And in all cases when

Infant borrows money and applies it to the payment of his debts for necessaries, he shall be liable in equity, though not at law; and this debt shall be paid out of trust estate devised for payment of debts.

when an infant borrows money, and applies it towards payment of his debts for necessaries, although he may not be liable at law, he must nevertheless be so in equity; because in this case the lender of the money stands in the place of the person paid, viz. the creditors for necessaries, and shall recover in equity as the other should have done at law. 1 *P. W.* 389.

This court will not examine a witness *viva voce* to prove a deed where an infant is a party.

Where an infant is party, and his interest is concerned, this court does not allow of an order to examine a witness *viva voce*, to prove a deed or exhibit, but the witness must be examined upon interrogatories before a Baron. 2. *P. W.* 464.

Where his interest is affected by a will, the original will must be given in evidence.

So in the case of a will devising an estate for the payment of debts, a probate copy of the will cannot be read. The original will must be produced.

Plaintiff or defendant being of age pending the suit, future proceedings to be carried on in their own names.

If an infant plaintiff or defendant arrives at full age pending a suit, all the future proceedings may be carried on in his own name, and the bill need not be amended or altered.

Defence

Defence by Answer---Idiots and Lunatics.

IDIOTS and lunatics defend by their committees, who are by order of the court appointed guardians for that purpose as a matter of course; and if it happens that an idiot or lunatic has no committee, or the committee has an interest opposite to that of the person whose property is entrusted to his care, an order may be obtained for appointing another person as guardian, for the purpose of defending a suit. So if a person in the condition of an idiot or lunatic, though not found such by inquisition, is made a defendant, the court, upon proper information of his incapacity, will direct a guardian to be appointed. *Mitf. on Plead. 94.*

Idiots and lunatics, by whom they may defend.

If a bill is brought against a lunatic, stating him to be such, it is a motion of course to apply to the court for a commission to assign him a guardian, and to take

Bill stating defendant to be a lunatic, a commission to assign him a guardian, issues of course, otherwise evidence of the lu-

nacy must be
laid before the
court.

take his answer by such guardian; but if the bill does not state the defendant to be a lunatic, in that case an affidavit or other evidence will be required to shew the defendant's lunacy before he can be permitted to answer by guardian. *Wollaston v. Sir Wolstan Dixie, Bart. 8th May 1790, in Scac.*

Idiots and persons reduced to a second infancy.

The like practice applies with respect to idiots and to those persons who by age or infirmity are reduced to a second infancy.

of

Of Paupers.

IT frequently happens that persons Who may sue or defend in formâ pauperis. who may have a right to estates, real or personal; yet by reason of their poverty are unable to prosecute that right, or being prosecuted, or made parties to a suit, yet are unable to make either a defence or a discovery therein; in such cases this court will admit such persons either to sue or defend *in formâ pauperis*.

The bill being filed, the counsel who How to obtain admission to sue in formâ pauperis. signed it must sign a petition, shortly stating the end of the bill, and certifying that the party hath good cause of suit. The following is the usual form of such a petition.

In the Exchequer.

Form of the
petition.

Between *A. B.* plaintiff,

and

C. D. defendant.

To the Right Hon. *William Pitt*,
Chancellor and Under Treasu-

rer

rer of his Majesty's court of Exchequer at *Westminster*; the Right Hon. Sir *Archibald Macdonald*, Kt. Lord Chief Baron of the same court; and to the rest of the Barons there.

The humble petition of *A. B.* the above-named complainant, sheweth, That your petitioner hath lately filed his bill in this honourable court against the above-named defendant (*here state the purpose for which the bill is brought, and then proceed thus*):

That your petitioner is advised, and humbly conceives, he hath good cause of suit against the said defendant, but by reason of the poverty of your petitioner, as appears by the annexed affidavit, he is utterly unable to prosecute his said suit, unless he is admitted so to do in the form of a poor person.

Your petitioner therefore most humbly prays your honours that he may be admitted to prosecute his said suit in the form of a poor person, and that *J. S.* may be assigned his counsel, and *T. R.*
his

his clerk in court. And your petitioner shall ever pray, &c.

A. B.

I humbly conceive that the said petitioner hath just cause to be relieved, touching the matters of this petition, and for which he hath exhibited his bill.

J. S.

Upon reading the above petition, and the affidavit hereunto annexed, I do admit the said *A. B.* to prosecute the above suit in the form of a poor person, and do assign him the counsel and clerk in court as prayed. Dated the day of
1795.

R. Perryn.

In the Exchequer.

Between *A. B.* plaintiff,
and
C. D. defendant.

Form of the
affidavit to be
annexed to the
above petition.

A. B. of in the county of
yeoman, the plaintiff in the above cause,
maketh oath and faith, that he this de-
ponent is not worth five pounds in all

the world, his just debts being first paid, his wearing apparel, and the matters in question in this cause only excepted.

A. B.

Sworn, &c. before

R. Perryn.

The petition and affidavit annexed being brought by the plaintiff's solicitor to the clerk in court assigned to prosecute the cause, the same are filed, and process of *subpœna* is made out in the usual form, but without being stamped, and the writ must be indorsed thus: "At the suit of *A. B.* a poor person. By bill."

Petition of a defendant to be admitted in *formâ pauperis*. In the Exchequer.

Between *A. B.* plaintiff,
and
C. D. defendant.

Sheweth, That your petitioner is served with process to appear to, and answer, the plaintiff's bill; but being very poor, as by his affidavit annexed appears, he is utterly unable to make his defence thereto, if not permitted to defend *in formâ pauperis*.

Your

Your petitioner therefore most humbly prays your Honours will be pleased to admit him to defend this suit in the form of a poor person, and to assign him for his counsel *J. S.* and *T. R.* for his clerk in court.

C. D.

Upon reading the above petition, and the affidavit hereunto annexed, I do admit the said *C. D.* to defend the above suit in the form a poor person, and do assign him the counsel and clerk in court as prayed. Dated the day of
1795.

R. Perryn.

In the Exchequer.

Between *A. B.* plaintiff,
and
C. D. defendant.

Form of defendant's affidavit annexed to his petition.

C. D. of in the county of
yeoman, maketh oath and faith, that he
this deponent is not worth the sum of
five pounds in all the world, his just debts
being first paid, his wearing apparel, and

the matters in question in this cause only excepted.

C.D.

Sworn, &c. before

R. Perryn.

As a party plaintiff may commence his suit in the form of a *dives*, so it sometimes happens, that in the progress of it he may be under the necessity of prosecuting it *in formâ pauperis*. In like manner this may be the condition of a defendant; and therefore paupers in this situation are required to give security by recognizance in 40*l.* to answer the costs already incurred by the former proceedings, before either the one can be allowed further to prosecute, or the other to defend, a suit *in formâ pauperis*; and the names and places of abode of two persons must be previously proposed as sureties, by the solicitor for the pauper to the adverse solicitor, for his approbation.

In

In the Exchequer.

Between *Anne Edsar*, spinster,
plaintiff,

and

Samuel Oxtaby, *John Butler*,
and others, defendants.

Form of a petition to be admitted to prosecute a suit in *forma pauperis*, after a plaintiff has commenced it in the form of a dives.

To the Right Hon. *William Pitt*,
Chancellor and Under Treasurer of his Majesty's court of Exchequer at *Westminster*; the Right Hon. Sir *Archibald Macdonald*, Kt. Lord Chief Baron of the same court; and the rest of the Barons there.

The humble petition of *Anne Edsar*, the above-named plaintiff, sheweth, That your petitioner having filed her bill in this honourable court against the above-named defendants, for the purposes therein mentioned, the said *Samuel Oxtaby* and *John Butler* put in their several answers thereto.

That your petitioner, in Trinity term last, replied to the said answers.

That your petitioner is advised, and humbly conceives, she hath good cause of complaint against the said defendants, but by reason of your petitioner's poverty, as appears by the annexed affidavit, she is not able further to prosecute the said suit, unless admitted so to do in the form of a poor person.

Your petitioner therefore most humbly prays your honours that she may be admitted to prosecute her said suit in the form of a poor person, and that *A. H.* Esq. may be assigned her counsel, and *J. S.* her clerk in court. And your petitioner shall ever pray, &c.

I humbly conceive that the said petitioner hath good cause of suit.

A. H.

Upon reading the above petition, and the affidavit hereunto annexed, I do admit the said *Anne Edsar* to prosecute the above suit in the form of a poor person, and do assign her the counsel and clerk in court as prayed. Dated this 31st day of January, 1792.

R. Perryn.

(Form

(Form of the affidavit to be annexed as before.)

This petition and affidavit being brought to the plaintiff's clerk in court, and by him duly filed, a note of the names and places of abode of two sureties, in 40*l.* is given over to the adverse clerk in court for his approbation, and upon his returning the same approved, the following recognizance is entered into.

Be it remembered that *D. C. of Lower Thames Street, London*, fruit merchant, and *William Webb of Layton's Building, High Street, Southwark*, in the county of *Surry*, gentlemen, come in their proper persons before the *Hon. Sir Richard Perryn, Kt.* one of the Barons of this Exchequer, the 27*th* day of *April*, in the 32*d* year of the reign of his present Majesty King *George the Third*, and jointly and severally acknowledge themselves indebted to his said Majesty in the sum of 40*l.*

Recognizance in 40*l.* costs, to answer costs previous to plaintiff's being admitted a pauper.

Whereas *Anne Edsar*, spinster, plaintiff, did in Easter term, in the 30*th* year of

of the reign of his present Majesty, exhibit her English bill of complaint in this honourable court against *John Butler*, *Samuel Oxtaby*, and *Sarah Anne Edsar*, defendants; to which bill the said *John Butler* and *Samuel Oxtaby* appeared and put in several answers, and the said plaintiff replied thereto; but the said plaintiff, by reason of her poverty, being unable to proceed further in the said cause, without being admitted to prosecute the same *in formâ pauperis*, had petitioned the Chancellor and Barons of this court to be admitted to sue *in formâ pauperis*; and thereupon the said *Anne Edsar*, on the 31st day of January last, was admitted to prosecute this suit against the said defendants *in formâ pauperis* accordingly: Now the condition of this recognizance is such, that if the above-named plaintiff shall well and truly answer and pay, or cause to be answered and paid, unto the said defendants *John Butler* and *Samuel Oxtaby*, all such costs as shall be taxed and allowed to them respectively in this cause, by the Deputy to his Majesty's Remembrancer of this court, from the commencement of this suit to the time of the said plaintiff's admission

mission to prosecute this suit *in formâ pauperis*, in case the said plaintiff's bill shall be dismissed, or the said costs shall be otherwise adjudged to the said defendants by any decree or order of this court, then this recognizance to be void, or otherwise the same shall remain and be in full force and virtue.

D. C.

W. W.

Taken and acknowledged, the day and year first above-written, before

R. Perryn.

A pauper cannot discharge himself of costs, he was liable to precedent to his admission. *Moseley*, 64.

As a party may be admitted *in formâ pauperis* at any time during the suit, so he may be dispaupered at any time upon its being made appear to the court that he is of such ability that he ought not to sue *in formâ pauperis*. And in a case of this nature, where it was shewed to the court that a pauper was in possession, and received the rents of the lands in question,

In what case a pauper was dispaupered.

tion, the court ordered him to be dispaupered, though the defendant had a verdict at law, and might thereupon take a writ of possession, &c. *Har. Chan. Prac. 6th Ed.*

Plaintiff and defendant may both be admitted in *formâ pauperis* in the same cause.

Both plaintiff and defendant may be admitted in *formâ pauperis* in the same cause; but this hath been complained of as an abuse, for that it tends much to the disquiet of the court, and encourages the parties to be vexatious; yet, where it is a matter of contest, and seems dubious, the court will admit both plaintiff and defendant to sue in *formâ pauperis*. *Ibid. title Paupers.*

Pauper in no case pays costs, but may receive them.

Yet he may be punished personally.

A pauper in no case pays costs, but may receive them; yet, where it has appeared that his suit has been vexatious, the court has in some cases ordered him to be whipped.

What fees a pauper is to pay.

All the proceedings on the part of a pauper are upon unstamped paper or parchment. He pays only twopence a sheet for copies.

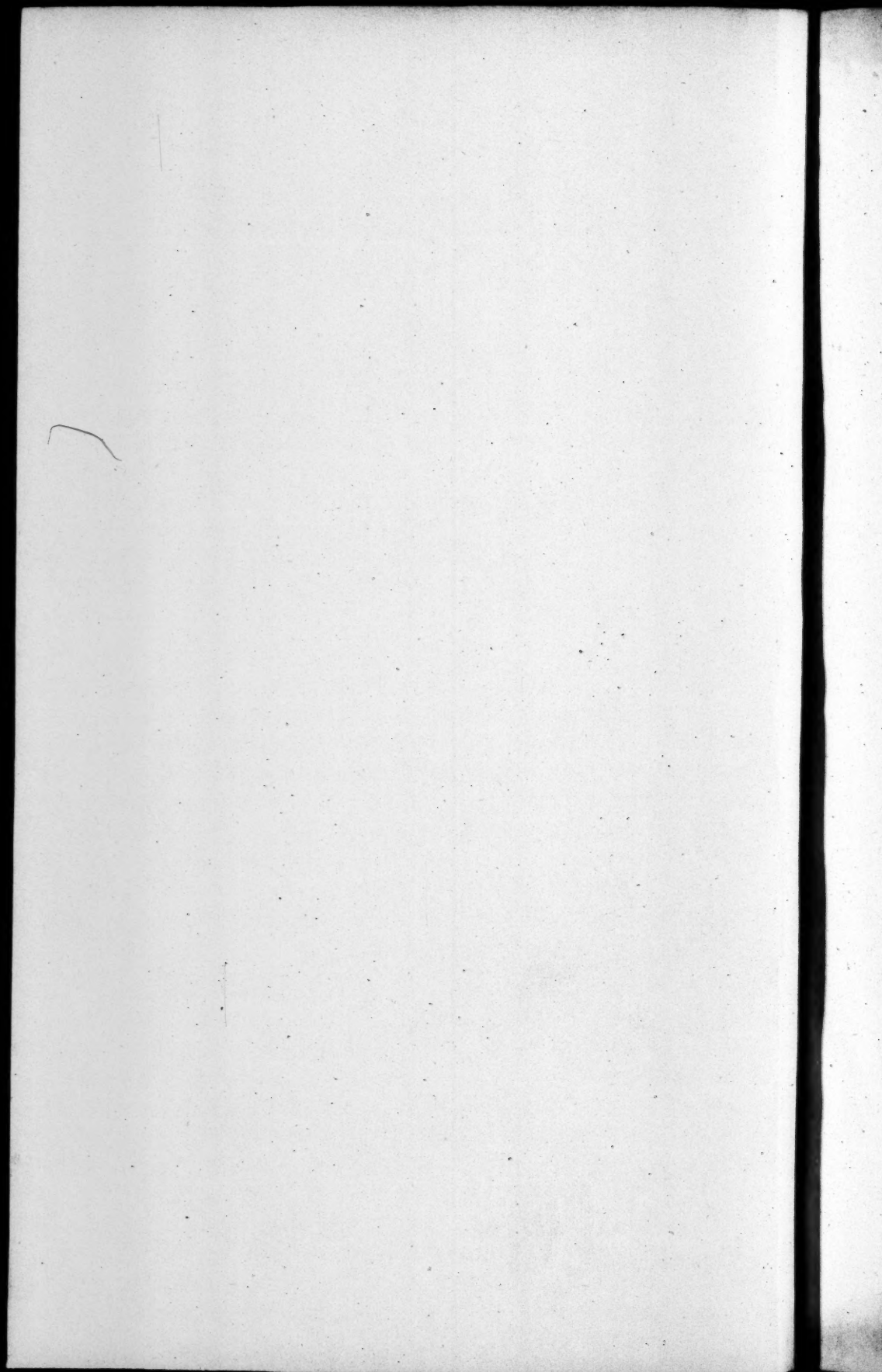
When-

Whenever a motion is made for amending the bill of a pauper, the counsel who makes the motion shall certify to the court the necessity for such amendment.

Bill of a pauper amended, counsel must certify the necessity for the amendment.

General order in Scac. 3d Nov. 1722.





2284.27

THE
PRACTICE
OF THE
COURT OF EXCHEQUER,
UPON
PROCEEDINGS IN EQUITY.
IN TWO VOLUMES.

VOLUME II.

BY DAVID BURTON FOWLER, ESQ.
ONE OF THE SIX CLERKS OF THAT COURT.

LONDON:
PRINTED BY T. BURTON,
FOR J. BUTTERWORTH, FLEET-STREET,
AND W. BROWN, STRAND.

1795.